Calendar No. 589

97TH CONGRESS
2d Session

SENATE

REPORT
No. 97-413

# SIKES ACT AMENDMENTS

MAY 25, 1982.—Ordered to be printed

Mr. CHAFEE, from the Committee on Environment and Public Works, submitted the following

## REPORT

[To accompany H.R. 1952]

The Committee on Environment and Public Works, to which was referred the Act (H.R. 1952) authorizing appropriations to carry out conservation programs on military reservations and public lands during fiscal years 1983, 1984, and 1985, having considered the same, reports favorably thereon with amendments and recommends that the Act as amended do pass.

### GENERAL STATEMENT

#### SIKES ACT BACKGROUND

The Sikes Act was passed in 1960 to provide a mechanism for cooperative Federal/State management of fish and wildlife on military reservations. The Act authorized the Secretary of the Interior, in cooperation with the Secretary of Defense and State Fish and Wildlife agencies, to carry out a program of planning, development, maintenance, and rehabilitation of fish and wildlife on these lands, and in 1968 $500,000 was authorized for the development of public recreation facilities on military lands. In 1974 the authorization of funds for the Sikes Act was increased to $1.5 million for the Secretary of Defense and $2 million for the Secretary of Interior.

In 1974, Congress expanded this program to authorize the Secretaries of the Interior and Agriculture to cooperate with the States in developing comprehensive plans for the conservation and rehabilitation of fish and wildlife on BLM and Forest Service lands, respectively. These agreements address issues such as habitat improvement, range rehabilitation, protection for threatened and endangered species, and control of off-road vehicles. Federal and State agencies may

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require special stamps to be sold by the State for hunting, trapping, and fishing on public lands, and revenues derived from this source are to be used by the States for implementing projects. $10 million per year through fiscal year 1978 was authorized to both Secretaries for development of these programs.

The 1974 amendments directed the Secretary of the Interior to develop cooperative programs with the Administrator of the National Aeronautics and Space Administration and the Chairman of the Atomic Energy Commission (now the Secretary of Energy) for lands administered by them.

In 1978, Congress reauthorized the Sikes Act for an additional three years. Under title I, the authorization to the Secretary of Defense was continued at $1.5 million per year and the authorization to the Secretary of the Interior was increased from $2 million to $3 million per year. Under title II, the authorization to the Secretary of the Interior was continued at $10 million per year and the authorization to the Secretary of Agriculture was increased from $10 million to $12 million per year.

The President's budgets for fiscal years 1982 and 1983 did not contain requests for funding under the Sikes Act. Nevertheless, the Committee believes it is important that the programs and purposes of this Act continue to be carried out, whether funds are appropriated under it or under other authorities. The agencies affected by the Sikes Act control over 600 million acres of fish, wildlife, and plant habitat. These lands contain a number of endangered species and offer high potential for public outdoor recreation.

The agencies may have the authority to carry out their activities without any appropriations authorizations under this Act, but the Committee questions whether they would have the impetus to do so without the congressional directive such authorizations provide. In addition, it is believed important to reauthorize funding under the Act to provide for future needs, to emphasize the Committee's continued commitment to the Sikes Act, and to assure its continued oversight over these valuable programs, however they are funded. The progress of these programs will be followed very closely over the next three years.

## LEGISLATION

H.R. 1952 was passed by the House of Representatives on September 21, 1981. Hearings were held on the legislation by the Senate Subcommittee on Environmental Pollution on February 8, 1982.

As passed by the House, H.R. 1952 makes several amendments to existing law. Specifically, the bill amends title I of the Act to (1) provide adequate protection for endangered or threatened species of fish, wildlife and plants; and (2) clarify that cooperative agreements referred to in the Sikes Act are documents in which Federal and State agencies mutually agree in principle on wildlife programs (rather than legal instruments as defined under the Federal Grant and Cooperative Agreement Act).

The bill amends title II of the Act to accomplish the same purposes outlined above for those programs invclving BLM, Forest Service, NASA and Energy lands. In addition, title II is amended to allow

the Secretary of the Interior and the Secretary of Agriculture to make purchases and contracts for property and services from, or provide assistance to, the State agencies without going through the advertising and competitive bidding requirements under the Federal Property and Administrative Services Act.

The House-passed bill also amended titles I and II of the Act to authorize the appropriation of "such sums as may be necessary" for each of fiscal years 1982, 1983, and 1984 and to authorize the use of any authorities available under other laws relating to fish, wildlife, or plants to carry out the provisions of the Act.

The Senate Subcommittee on Environmental Pollution considered H.R. 1952 on April 28, 1982, amended the bill and unanimously recommended that the Committee on Environment and Public Works report the bill as amended. The amendments adopted by the Committee substituted existing levels of authorization for each of fiscal years 1983, 1984 and 1985. Two nongermane amendments were also adopted. These amendments (1) make technical corrections to a provision of the Fish and Wildlife Conservation Act of 1980 (the Nongame Act) relating to a study of funding alternatives and (2) reauthorize a provision in the Anadromous Fish Conservation Act relating to a study of the striped bass.

## Section-by-Section Analysis

### SECTION 1

Section 1 would ensure that any cooperative plans which are developed to carry out conservation and rehabilitation programs on military reservations, and which are agreed to by the Secretaries of Defense and the Interior and the appropriate State agency, will provide for habitat improvement projects and related activities, and adequate protection, for endangered or threatened species of fish, wildlife, and plants.

This language would bring title I of the Sikes Act into conformity with title II and specifically provide for protection of threatened or endangered plants on military lands.

Section 1 would also add a new sentence to section 101 of the Sikes Act to clarify that any cooperative plans agreed to for military reservations will not be deemed to be, nor treated as, cooperative agreements to which the Federal Grant and Cooperative Agreement Act of 1977 applies. This amendment to the Sikes Act would conform title I to title II and serves the same purpose as section 4 of the bill, discussed below.

### SECTION 2

Section 2 would authorize to be appropriated for each of fiscal years 1983, 1984 and 1985, $1.5 million for the Secretary of Defense and $3 million for the Secretary of the Interior to carry out their responsibilities under title I of the Sikes Act. They are also authorized to use their authorities under other laws relating to fish, wildlife, or plant conservation or rehabilitation in order to carry out the provision of title I of the Act.

The Committee is aware that those Federal agencies with Sikes Act responsibilities have, since enactment of the Sikes Act, always used other existing appropriations authorities to carry out the Sikes Act programs. In order to ensure that these programs will continue to be successfully carried out on the public lands, these amendments recognize the existing practice of using other appropriations authorities. To ensure oversight of the activities carried out pursuant to the Sikes Act, regardless of how they are funded, these amendments reauthorize appropriations at existing levels for an additional three years.

SECTION 3

Section 3 would provide that conservation and rehabilitation programs carried out under title II of the Sikes Act will include habitat improvement projects and adequate protection for threatened or endangered species of fish, wildlife, and plants. The Act, as written, provides for protection of species considered endangered or threatened. The Committee wants to clarify that plants will be included in conservation and rehabilitation programs on Bureau of Land Management, Forest Service, National Aeronautics and Space Administration, and Department of Energy lands.

SECTION 4

Section 4 would provide that any agreement entered into by State agencies pursuant to section 202 of the Sikes Act will not be deemed to be, nor treated as, cooperative agreements to which the Federal Grant and Cooperative Act (FGCA) applies.

Traditionally, the term "cooperative agreement" as used in the Sikes Act is understood to mean documents in which Federal and State agencies mutually agree in principle on wildlife programs. The FGCA was enacted in 1977 for the purpose of distinguishing Federal assistance relationships from Federal procurement relationships and to clarify the meaning of contracts, grants, and cooperative agreements. Cooperative agreements under the FCGA are considered to be specific legal instruments which are used to provide assistance to states and in which the relationship between the Federal Government and the state is reflected.

There has been considerable confusion since enactment of the FGCA in 1977 and the Committee wants to clarify that agreements between Federal and state agencies under the Sikes Act will not be considered or treated as cooperative agreements under the Federal Grant and Cooperative Agreement Act.

SECTION 5

Section 5 would authorize to be appropriated for each of fiscal years 1983, 1984, and 1985, $10 million for the Secretary of the Interior and $12 million for the Secretary of Agriculture to carry out their responsibilities under title II of the Sikes Act. They are also authorized to use any authorities under other laws to carry out the Sikes Act programs. This is similar to section 2 discussed above.

Section 5 also adds a new subsection (d) to section 209 of the Sikes Act to authorize the Secretaries of the Interior and Agriculture to make purchases and contracts for property and services from, or provide assistance to, the State agencies for projects and programs carried out on, or of benefit to, Federal lands, without regard to title III of the Federal Property and Administrative Services Act of 1949 (FPASA).

Title III of the FPASA requires that all purchases and contracts for property and services made by Federal agencies must be made through advertising and negotiated bidding, unless such contracts involve less than $2,500 or unless otherwise authorized by law. In order to avoid the competitive bidding procedures when contracting with the states for property, services or assistance, lengthy justifications must be prepared as to why the state agency should receive the contract rather than another organization or individual. It then must be sent to higher levels for approval. If the information is insufficient or does not contain adequate justification for the state to do the work, for instance, the justification papers must go back to the field office for redrafting. This process has become burdensome and time-consuming and, consequently, many projects needing immediate action due to biological necessity (i.e., species counts during particular seasons of the year) are not carried out at all or are delayed for another year when approval is finally received.

The procedure described above tends to defeat the purposes of Federal-State cooperation in carrying out Sikes Act projects and programs. This amendment will eliminate this long, drawnout procedure.

SECTION 6

Section 6 would amend section 12 of the Fish and Wildlife Conservation Act of 1980 (the Nongame Act). Section 12 of the Nongame Act requires that the U.S. Fish and Wildlife Service conduct a study by March 1984 on alternative methods of funding the Federal nongame program. The Act requires that the study be conducted with funds appropriated for this new program. The study on funding alternatives has been unable to proceed, however, because no funds have been appropriated under the Act. This amendment would (1) delete the limitation on how to fund the study and (2) extend the deadline for completion of the study to December 31, 1984. This amendment would allow the U.S. Fish and Wildlife Service to use other existing appropriations authorities to carry out the nongame study.

SECTION 7

Section 7 would authorize to be appropriated for fiscal years 1983 and 1984, $2 million to complete an emergency study on the decline of the striped bass pursuant to section 7(d) of the Anadromous Fish Conservation Act.

The emergency striped bass study is now in its third and, unless reauthorized, final year. The study is conducted jointly by the Secretaries of Interior and Commerce and was directed by Congress as a result of concern over the serious decline in populations of the fish in the Atlantic region. The popularity of the striped bass among both

commercial and recreational fishermen gives it significant importance to the economy of Atlantic coastal States. For instance, a 1970 survey conducted by NOAA indicated that over three-quarters of a million recreational anglers in the northeast and mid-Atlantic States harvested 73 million pounds of striped bass and spent over $100 million in doing so. Another 10.1 million pounds worth some $2.5 million in dockside value were landed by commercial fishermen. While the demand on striped bass populations has been growing yearly, however, a scarcity of striped bass has developed in Atlantic Coastal Waters over recent years. There has not been a good reproductive year for stripers since 1970, and in fact, studies show that the 1981 levels of striped bass populations are among the lowest on record. Restoration of fish populations will have a positive impact on the economy of coastal states.

In 1979, Congress specifically directed the National Marine Fisheries Service and the Fish and Wildlife Service to determine the status of the striped bass populations and reasons for its decline. To do so, data must be collected over a number of years so that comparisons can be made of fluctuations in population levels, and so that population trends can be established. Establishing such a data base makes it possible to correlate population fluctuations to specific environmental occurrences or conditions, thereby facilitating identification of factors that have led to the decline of the striped bass population in recent years. For instance, if a certain chemical is found in estuarine areas during years when populations are low but not when they are high, there would be reason to believe that the chemical was responsible, at least in part, for fish mortality or lack of spawning success. The establishment of such a data base, however, cannot be completed in the 3 years of the initial authorization due to the complex life cycle of the striped bass which lasts from 4 to 7 years.

Since the study has not yet progressed to the point where any concrete conclusions can be arrived at as to the cause or causes of the striped bass decline, the investment of $2.55 million of Federal funds and a substantial amount of State funds during the last 2 years would be an almost total waste of funds if the study is not reauthorized. While some States may continue the population status studies, which they are now undertaking under the umbrella of the emergency study, there would likely be a loss of the coastwide coordinated effort that now exists. Furthermore, the population status studies in themselves, while possibly revealing the current conditions of the fish, will not identify causes of the current decline, because these studies were largely assigned to the Fish and Wildlife and National Marine Fisheries Services under the emergency striped bass study. Due to other Service needs and priorities, this work would not continue without the extension of the Act and its funding. The extension provided by this amendment should allow the time needed to complete analysis of the complex biological systems involved.

## Rollcall Votes

Section 7(c) of rule XXVI of the Standing Rules of the Senate requires publication of any rollcall votes. There was one rollcall vote during the committe's consideration of the bill. The committee ordered the bill reported by unanimous rollcall vote on May 6, 1982.

## Evaluation of Regulatory Impacts

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee makes the following evaluation of the regulatory impact of the reported bill.

The reported bill does not add to or reduce the regulatory authority provided by existing law.

The bill has no impact on the personal privacy of individuals.

The bill has an impact on paperwork to the extent that Federal agencies may now make purchases and contracts for property and services from the state agencies for projects and programs carried out on, or of benefit to, Federal lands, without regard to title III of the Federal Property and Administrative Services Act of 1949.

There is no specific economic impact of the bill.

The bill has no impact on recordkeeping requirements.

## Cost of Legislation

Paragraph 11(a) of rule XXVI of the Standing Rules of the Senate requires cost estimates and comparisons of costs to be incurred in carrying out the bill to be published in reports. In accordance with section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared a report on the costs to be incurred by the Federal Government resulting from the enactment of this bill. Such cost estimates follow:

U.S. Congress,
Congressional Budget Office,
*Washington, D.C., May 12, 1982.*

Hon. Robert T. Stafford,
*Chairman, Committee on Environment and Public Works, U.S. Senate, Washington, D.C.*

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 1952, a bill authorizing appropriations to carry out conservation programs on military reservations and public lands during fiscal years 1983, 1984, and 1985, and for other purposes.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Alice M. Rivlin, *Director.*

### Congressional Budget Office—Cost Estimate

1. Bill number: H.R. 1952.

2. Bill title: A bill authorizing appropriations to carry out conservation programs on military reservations and public lands during fiscal years 1983, 1984, and 1985, and for other purposes.

3. Bill status: As ordered reported by the Senate Committee on Environment and Public Works, May 6, 1982.

4. Bill purpose: The bill, which amends the Sikes Act, authorizes appropriations of $26.5 million in each of fiscal years 1983, 1984, and 1985 to implement conservation programs on government lands. The

Department of Defense is authorized to administer conservation programs on military reservations with technical assistance provided by the Department of the Interior, and the Departments of the Interior and Agriculture are authorized to conduct conservation programs on lands under their jurisdictions. The authorizing legislation is subject to subsequent appropriations action.

In addition, $2 million in each of fiscal years 1983 and 1984 is authorized to be appropriated to the Secretary of the Interior for research related to striped bass populations.

5. Cost estimate:

| | Millions |
|---|---|
| Authorization level: | |
| Fiscal year: | |
| 1983 | $28.5 |
| 1984 | 28.5 |
| 1985 | 26.5 |
| 1986 | ---- |
| 1987 | ---- |
| Estimated outlays: | |
| Fiscal year: | |
| 1983 | 24.3 |
| 1984 | 28.5 |
| 1985 | 26.7 |
| 1986 | 4.0 |
| 1987 | ---- |

The costs of this bill fall within budget function 300.

6. Basis of estimate: Authorization levels are those stated in the bill. Appropriations are assumed to be made under these authorizations before the beginning of each fiscal year. Outlays were estimated based on historical spending patterns and information from the relevant agencies.

Appropriations for activities authorized by the Sikes Act have generally been below the authorized levels, and agencies have usually used funds appropriated pursuant to other authorizations. The Department of Defense has used its civil engineering operation and maintenance funding, the Forest Service (in the Department of Agriculture) has used a portion of its appropriations for wildlife programs, the Bureau of Land Management (in the Department of the Interior) has relied primarily on appropriations under the Federal Land Policy and Management Act (FLPMA) and the Public Rangelands Improvement Act (PRIA), and the Fish and Wildlife Service (also in Interior) has funded its related programs from its general resource management appropriations.

7. Estimate comparison: None.

8. Previous CBO estimates: On May 11, 1981, CBO prepared a cost estimate for H.R. 1952, as ordered reported by the House Committee on Merchant Marine and Fisheries. That bill authorized the appropriation of such sums as necessary to implement the Sikes Act; it did not authorize appropriations for striped bass research. However, on May 7, 1982, a cost estimate was prepared for the House Committee on Merchant Marine and Fisheries for H.R. 5663, a bill to authorize appropriations to carry out the Anadromous Fish Conservation Act during fiscal year 1983, 1984, and 1985, and for other purposes. That bill authorized $1.0 million annually for 1983 through 1985 for the Emergency Striped Bass Research Program. Authorizations for

other Anadromous Fish Conservation Act programs were also authorized by H.R. 5663.

9. Estimate prepared by: Anne E. Hoffman (226–2860).

10. Estimate approved by:

JAMES L. BLUM,
*Assistant Director for Budget Analysis.*

## CHANGES IN EXISTING LAW

In compliance with the requirements of section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

### 16 U.S.C. 670a, 670f–670h, 670*o*

**§ 670a. Wildlife, fish and game conservation; cooperative plan between Secretary of Defense, Secretary of Interior, and State agencies; permits; fees.**

The Secretary of Defense is hereby authorized to carry out a program of planning, development, maintenance and coordination of wildlife, fish and game conservation and rehabilitation in military reservations in accordance with a cooperative plan mutually agreed upon by the Secretary of Defense, the Secretary of Interior and the appropriate State agency designated by the State in which the reservation is located. Such cooperative plan shall provide for (1) fish and wildlife habitat improvements or modifications, (2) range rehabilitation where necessary for support of wildlife, [and] (3) control of off-road vehicle traffic, *and (4) specific habitat improvement projects and related activities and adequate protection for species of fish, wildlife, and plants considered threatened or endangered.* Such cooperative plan may stipulate the issuance of special State hunting and fishing permits to individuals and require this payment of a nominal fee therefor, which fees shall be utilized for the protection, conservation and management of fish and wildlife, including habitat improvement and related activities in accordance with the cooperative plan: *Provided*, That the Commanding Officer of the reservation or persons designated by him are authorized to enforce such special hunting and fishing permits and to collect the fees therefor, acting as agent or agents for the State if the cooperative plan so provides. *Cooperative plans agreed to under the authority of this section and section 670b shall not be deemed to be, nor treated as, cooperative agreements to which the Federal Grant and Cooperative Agreement Act of 1977 (41 U.S.C. 501 et seq.) applies.*

* * * * * * *

**§ 670f. Expenditure of funds collected; purposes; authorization of appropriations; utilization of services of Secretary of Interior; availability of funds.**

(a) The Secretary of Defense shall expend such funds as may be collected in accordance with the cooperative plans agreed to under sections 670a and 670b of this title and for no other purpose.

(b) There are authorized to be appropriated to the Secretary of Defense not to exceed $1,500,000 for each of the fiscal years [ending September 30, 1979, September 30, 1980, and September 30, 1981.] *1983, 1984, and 1985*, to carry out this title, including the enhancement of fish and wildlife habitat and the development of public recreation and other facilities. The Secretary of Defense shall, to the greatest extent practicable, enter into agreements to utilize the services, personnel, equipment, and facilities, with or without reimbursement, of the Secretary of the Interior in carrying out the provisions of this section.

(c) There are authorized to be appropriated to the Secretary of the Interior not to exceed $3,000,000 for each of the fiscal years [ending September 30, 1979, September 30, 1980, and September 30, 1981.] *1983, 1984, and 1985*, to carry out such functions and responsibilities as the Secretary may have under cooperative plans to which such Secretary is a party under this section, including those for enhancement of fish and wildlife habitat and the development of public recreation and other facilities.

*(d) The Secretary of Defense and the Secretary of the Interior may each use any authority available to him under other laws relating to fish, wildlife, or plant conservation or rehabilitation for purposes of carrying out the provisions of this title.*

**§ 670g. Wildlife, fish, and game conservation and rehabilitation programs; cooperation between Secretary of Interior Secretary of Agriculture, and State agencies in planning, etc., in accordance with comprehensive plans; scope and implementation of programs.**

(a) The Secretary of the Interior and the Secretary of Agriculture shall each, in cooperation with the State agencies and in accordance with comprehensive plans developed pursuant to section 670h of this title, plan, develop, maintain, and coordinate programs for the conservation and rehabilitation of wildlife, fish, and game. Such conservation and rehabilitation programs shall include, but not be limited to, specific habitat improvement projects and related activities and adequate protection for species *of fish, wildlife, and plants* considered threatened or endangered.

(b) The Secretary of the Interior shall implement the conservation and rehabilitation programs required under subsection (a) of this section on public land under his jurisdiction. The Secretary of the Interior shall adopt, modify, and implement the conservation and rehabilitation programs required under subsection (a) of this section on public land under the jurisdiction of the Chairman, but only with the prior written approval of the Atomic Energy Commission, and on public land under the jurisdiction of the Administrator, but only with the prior written approval of the Administrator. The Secretary of Agriculture shall implement such conservation and rehabilitation programs on public land under his jurisdiction.

**§ 670h. Comprehensive plans for conservation and rehabilitation programs.**

(a) Development by Secretary of Interior and Secretary of Agriculture; consultation with State agencies; prior written approval of concerned Federal agencies.

* * * * * * *

*(d) Agreements entered into by State agencies under the authority of this section shall not be deemed to be, or treated as, cooperative agreements to which the Federal Grant and Cooperative Agreement Act of 1977 (41 U.S.C. 501 et seq.) applies.*

* * * * * * *

**§ 670o. Authorization of appropriations.**

(a) Development by Secretary of Interior and Secretary of Agri- for each of the fiscal years [ending September 30, 1979, September 30, 1980, and September 30, 1981,] *1983, 1984, and 1985*, to enable the Secretary of the Interior to carry out his functions and responsibilities under this title, including data collection, research, planning, and conservation and rehabilitation programs on public lands. Such funds shall be in addition to those authorized for wildlife, range, soil, and water management pursuant to section 318 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1748), or other provisions of law.

(b) There are authorized to be appropriated the sum of $12,000,000 for each of the fiscal year [ending September 30, 1979, September 30, 1980, and September 30, 1981,] *1983, 1984, and 1985*, to enable the Secretary of Agriculture to carry out his functions nad responsibilities under this title. Such funds shall be in addition to those provided under other provisions of law. In requesting funds under this subsection the Secretary shall take into account fish and wildlife program needs, including those for projects, identified in the State comprehensive plane as contained in the program developed pursuant to the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended (16 U.S.C. 1601–1610).

*(c) The Secretary of the Interior and the Secretary of Agriculture may each use any authority available to him under other laws relating to fish, wildlife, or plant conservation or rehabilitation for purposes of carrying out the provisions of this title.*

*(d) The Secretary of the Interior and the Secretary of Agriculture may each make purchases and contracts for property and services from, or provide assistance to, the State agencies concerned, if such property, services or assistance is required to implement those projects and programs carried out on, or of benefit to, Federal lands and identified in the comprehensive plans or cooperative agreements developed under Section 292, without regard to Title III (other than section 304) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251–260).*

**16 U.S.C. 2911 (section 12, P.L. 96–366; 94 Stat. 1330)**

**SEC. 12. STUDY.**

The Director of the United States Fish and Wildlife Service, in consultation with affected parties, shall conduct [out of funds available for the administration of this Act] a comprehensive study to determine the most equitable and effective mechanism for funding State conservation plans and actions under this Act, including, but not limited to, funding by means of an excise tax on appropriate items. On or before [the expiration of the 30-month period following the date of enactment of this Act] *December 31, 1984*, the Director shall report to the Committee on Environment and Public Works of the

Senate and to the Committee on Merchant Marine and Fisheries of the House of Representatives the results of such study, together with his recommendations with respect thereto.

**16 U.S.C. 757g(d) (section 7, P.L. 89–304, as added to section 4, PL. 96–118; 93 Stat. 859)**

§ 757g(d) There are authorized to be appropriated for the purposes of carrying out the studies described in subsection (a) of this section not to exceed [$1,000,000 for the fiscal year ending September 30, 1980, not to exceed $1,750,000 for the fiscal year ending September 30, 1981, and not to exceed $2,000,000 for the fiscal year ending September 30, 1982.] *$2,000,000 for the period beginning October 1, 1982, and ending September 30, 1984.* Funds authorized to be appropriated by this subsection are in addition to any funds authorized by section 757d of this title which may be used for projects involving or affecting striped bass. If the Secretary considers that the studies described in subsection (a) of this section should be continued after September 30, 1982, the Secretary shall inform the Congress in writing before February 15, 1981, of the reasons why and for how long such continuation is believed to be warranted.

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Calendar No. 600

97TH CONGRESS
2d Session

SENATE

REPORT
No. 97-418

# ENDANGERED SPECIES ACT AMENDMENTS OF 1982

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## REPORT

OF THE

## COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

TO ACCOMPANY

## S. 2309

MAY 26 (legislative day, MAY 25), 1982.—Ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
94-389 O WASHINGTON: 1982

5323-2

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Calendar No. 600

97TH CONGRESS, 2d Session } SENATE { REPORT No. 97-418

# ENDANGERED SPECIES ACT AMENDMENTS OF 1982

MAY 26 (legislative day, MAY 25), 1982.—Ordered to be printed

Mr. CHAFEE, from the Committee on Environment and Public Works, submitted the following

## REPORT

[To accompany S. 2309]

The Committee on Environment and Public Works, to which was referred the bill (S. 2309) to authorize appropriations carry out the provisions of the Endangered Species Act of 1973 for fiscal years 1983, 1984, and 1985, and for other purposes having considered the same, reports favorably thereon with amendments and an amendment to the title and recommends that the bill (as amended) do pass.

### GENERAL STATEMENT

The Endangered Species Act of 1973 (ESA or the Act) as amended, is the first comprehensive legislation enacted to conserve endangered and threatened species and their habitat. However, development of the current ESA programs to conserve endangered and threatened species can be traced back to 1966.

The first legislation enacted specifically to protect endangered species was the Endangered Species Preservation Act of 1966 (P.L. 89-669). The 1966 Act contained four important provisions. First, it directed the Secretary of the Interior to "carry out a program in the United States of conserving, protecting, restoring and propagating selected species of native fish and wildlife." Second, it authorized the acquisition of endangered species habitat for inclusion in the National Wildlife Refuge System using funds up to $15 million from the Land and Water Conservation Fund, provided that no more than $750,000 be spent on any one area. Third, it required the preparation of an official list of endangered species. Fourth, it declared that the Departments of Interior. Agriculture, and Defense shall seek to protect species of native fish and wildlife threatened with extinction and shall preserve their habitat on lands under their jurisdiction if it is practicable and consistent with the primary purposes of the Departments' agencies.

Although the 1966 Act was an important step towards conserving endangered species, it had serious drawbacks including its failure to prohibit the taking of endangered species. The habitat protection provisions of the 1966 Act were of little consequence because the agencies were only directed to protect habitat "insofar as practicable and consistent with the primary purposes" of the agencies, and because of the limited acquisition authority given the Secretary of the Interior. Furthermore, the 1966 Act applied only to native wildlife as opposed to foreign wildlife.

The Endangered Species Conservation Act of 1969 (P.L. 91–135) corrected several of the weaknesses of the 1966 Act. The 1969 Act expanded the Secretary's habitat acquisition authority by increasing the maximum amount that could be spent on any one area to $2.5 million from the $750,000 limit of the 1966 Act. It also redefined fish and wildlife to include "any wild mammal, fish, wild bird, amphibian, reptile, mollusk, or crustacean." The 1966 Act had been limited to vertebrate animals. But the international aspects of the 1969 Act were the most noticeable improvement. It authorized the publication of a list of species or subspecies of fish and wildlife threatened with "world-wide" extinction and prohibited their importation into the United States.

Even with the 1966 and 1969 Acts, the endangered species program was far from adequate. There still were no prohibitions on the taking of endangered species, and the habitat protection provisions were limited to only a few agencies and then only if they were practicable and consistent with the primary purposes of those agencies.

In 1973 Congress again turned its attention to endangered species. That year it enacted the comprehensive Endangered Species Act of 1973 to correct the shortcomings of its previous legislative efforts. The 1973 Act embraced "any member of the animal kingdom" within its protective reach, and for the first time authorized the listing and conservation of plants. It also established the threatened species category in addition to endangered species, thereby affording protection to species before they become endangered. The 1973 Act also included several provisions to protect endangered species and their habitat. It provided for the designation of critical habitat for endangered and threatened species to protect that essential habitat, and eliminated all restrictions on the expenditure of money from the Land and Water Conservation Fund. Significantly, the 1973 Act, for the first time, prohibited the taking of endangered species. Section 7 of the 1973 Act imposed strict but necessary requirements on all Federal agencies to protect endangered and threatened species and their habitat. First, each agency must utilize their programs to further the purposes of the Act and to carry out conservation requirements; and second, each agency must ensure that its activities do not jeopardize the continued existence of endangered or threatened species or destroy or modify critical habitat.

Since its enactment in 1973 the Endangered Species Act has remained intact with only one major amendment in 1978. That year Congress amended the Endangered Species Act of 1973 to establish an Endangered Species Interagency Committee to review Federal agency actions that would jeopardize the continued existence of a threatened or endangered species or destroy critical habitat. The Endangered

Species Committee then determines whether the Federal action should be exempted from the Act's prohibition of such actions. At the same time, Congress also amended the 1973 Act to require the designation of critical habitat as part of the listing process.

In 1979, Congress amended several sections of the 1973 Act in large part to bring them into conformance with agency practice and judicial decisions. None of the amendments significantly changed the substantive provisions of the 1973 Act.

The long and painstaking development of the Federal endangered and threatened species program demonstrates a commitment to the conservation of these species and their habitat. The authorization for appropriations to implement the Act expires on September 30, 1982. S. 2309 continues the Federal commitment to the conservation of endangered and threatened species and their habitat and extends the budget authority for the endangered species program through fiscal year 1985 at current authorization levels. The fact that in recent years Presidential requests for appropriations for this program and actual appropriations for the program have been significantly less than the amounts authorized is of great concern to the Members of this Committee. Significant funding reductions in fiscal year 1982, for example, have undercut the ability of the Federal Government to satisfactorily carry out its numerous responsibilities under the Act. Similarly, the elimination of funds for section 6 grants to the States has seriously disrupted the many excellent State endangered species programs. Adequate funding at or near the levels authorized by this Committee is essential to ensure the success of this important and well-established program.

The Nation has had nine years of experience with the Endangered Species Act of 1973. While the Committee found in its hearings that the Act has been the subject of much controversy, close scrutiny, and discussion, the experience shows that the Act has worked well. It has evolved to permit greater flexibility and predictability with regard to economic development and major revisions are not needed.

In addition to extending the authorization of appropriations for three years, the bill amends the current law in several respects to correct several problem areas and to make the program work better.

Under current law, the Secretary can authorize the establishment of experimental populations to aid recovery of a species, e.g. reestablishment in the wild of captive bred individuals. Other Federal agencies, State officials and private individuals, however, are reluctant to allow experimental or new populations of endangered species to be established on their land for fear that the section 7 jeopardy standard, critical habitat designation, and the section 9 taking prohibitions will be applied to limit their land management options.

Section 2 of S. 2309 encourages the establishment of "experimental populations" by allowing the establishment of such populations in a manner that would not trigger the full protective measures of the Act. All experimental populations would be treated as if they were "threatened" species. For the purposes of section 7 and critical habitat designation, "non-essential" populations (those that do not occur on Natonal Wldlife Refuges and that the Secretary finds are not necessary for the continued existence of the species) would be treated as if they were species "proposed" to be listed.

Treatment as "threatened" provides a mechanism to address the concern about mandatory application of the section 9 taking prohibition. Treatment as "proposed" addresses the concerns about application of the section 7 jeopardy standard and critical habitat designation.

The current listing process is poorly drafted with many complex and duplicative provisions. Furthermore, as a result of numerous procedural requirements and the absence of meaningful time limits, the listing process has come to a virtual standstill.

The 1978 amendments to the ESA required the designation of critical habitat as part of the listing process. The enactment of those amendments to section 4 burdened the listing process with nonbiological factors and, as a result, greatly decreased the number of listings. Excluding the listings that already had been proposed before the 1978 amendments to section 4, there have been only 15 new listings since those changes; in only one of the 15 listings was critical habitat designated. Thus, the designation of critical habitat has failed on two grounds. First, it is not being designated. Second, it has improperly delayed listings.

Under current law, the Secretary is given two years from date of proposal to finalize a listing action. However, if he misses the deadline the proposal is simply dropped with no reviewable decision having been made. The lack of meaningful deadlines affects proposals to delist species as well.

This bill would amend the current listing process to correct these numerous problems. First, many portions of the current law would be reordered and consolidated to provide clarity. Second, by imposing upon the Secretary a mandatory, nondiscretionary duty to make and publish decisions on petitions and in-house generated proposals to list or delist, S. 2309 would force judicially reviewable action and would, therefore, impose meaningful time limits. Finally, the bill restates the current requirement that decisions on listing are to be made solely on the basis of biological information. Testimony received from the Director of the U.S. Fish and Wildlife Service at oversight hearings before the Committee explained that under current law, some economic analysis is done for all listing packages but that this analysis is used for informational purposes only; decisions on listing are made solely on the basis of biological information. These amendments would ensure that such economic analysis is used for informational purposes only and that such analysis will not delay or affect decisions on listing.

The bill would also streamline the section 7 exemption process. In 1978 the Act was amended to provide a mechanism to exempt Federal development activities from section 7 if they are found to be in the public interest. However, industry representatives testified that they find the exemption process time consuming and unworkable. Under the 1978 amendment, a 3-member review board (representatives from the Department of the Interior, the affected State, and an administrative law judge) certifies to a 7-member cabinet level Endangered Species Committee that an exemption applicant has met certain specified criteria—engaged in good faith consultation, conducted a biological assessment of the project area, and refrained from irreversible and irretrievable commitments of resources. The Board

then prepares a detailed report on the activity for the Committee and the Committee votes on whether or not to exempt the activity from the Act.

Although complaints about this section of the law were undocumented, based on fear rather than fact, the bill would shorten the process so that a decision is rendered within 200 days from the date of application for an exemption instead of the current 360 days. The Secretary of the Interior (or, where Fish and Wildlife Service opinions are at issue, the Secretary of Commerce) is substituted for the Review Board, must hold a formal hearing with an administrative law judge presiding, and, in consultation with Members of the Endangered Species Committee, prepare the detailed report for the Committee.

S. 2309 also contains an amendment to resolve the conflict between sections 7 and 9 of the Act. Section 7 provides for a consultation process between Federal agencies prior to any Federal action that might jeopardize the continued existence of an endangered or threatened species or its critical habitat. If the Secretary of the Interior or the Secretary of Commerce issues a "no jeopardy" opinion regarding a proposed project, the Federal agency may proceed. However, a favorable consultation under section 7 does not free the agency or the permittee, if any, from the strict prohibitions of section 9 of the Act, which prohibits the "taking" of any individual specimen of an endangered species. The amendment would remedy this statutory contradiction by providing that action that is in compliance with measures specified by the Secretary to minimize takings in section 7 consultation will be exempt from the prohibition in section 9 against incidental takings.

The bill would overrule a D.C. Circuit Court of Appeals decision requiring the Secretary to have population estimates prior to allowing the export of species that are not listed on the United States endangered species lists but are listed on Appendix II of the Convention on International Trade in Endangered Species (CITES). Section 8 of S. 2309 requires the Secretary to make determinations on the basis of "the best available biological information derived from professionally accepted wildlife management practices". This in no way diminishes the responsibility of the United States under CITES.

Section 10 of S. 2309 adds to the policy statement in current law a recognition of water resource problems and instructs the Federal Government to work with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

The problem of over-collecting of listed plants was well documented in hearings held by this Committee. As a first step to resolve this problem, section 11 of the bill provides the tools to halt such collection from Federal lands.

The provisions of S. 2309 amend current law in response to real problems that have arisen since Congress last considered the Act. The bill maintains the integrity and strength of the Endangered Species Act of 1973, a landmark piece of legislation.

## SECTION-BY-SECTION ANALYSIS

### SECTION 1. SHORT TITLE

The short title of this bill is the "Endangered Species Act Amendments of 1982".

### SECTION 2. EXPERIMENTAL POPULATIONS

Section 2 of S. 2309 would add to the Act new provisions that are intended to give greater flexibility to the Secretary in the treatment of populations of endangered or threatened species that are purposely introduced into areas outside their current range to further the conservation of the species. Such introductions, if carefully planned and controlled, may be beneficial in securing the recovery of listed species. Thus, to encourage efforts to establish such experimental populations when the conservation needs of a species would be served by doing so, this amendment would relax certain restrictions otherwise applicable to listed species and authorizes the Secretary to relax others.

Subsection 2(a) of S. 2309 would add a new paragraph (7) to section 3 of the Act to define the term "experimental population". To qualify for special treatment afforded experimental populations, a population must have been released outside the current range of the species to further its conservation. The transport and release of such specimens must be pursuant to the Act, that is, permitted by the Secretary pursuant to section 10 by permit, regulation or otherwise. Populations resulting from releases that have not been permitted by the Secretary shall not be considered "experimental populations" entitled to the special provisions of this subsection.

The bill carefully defines how to treat introduced populations that overlap, in whole or in part, natural populations of the same species. To assure adequate protection of natural populations and to avoid potentially complicated problems of law enforcement, the definition is limited to those introduced populations that are wholly separate geographically from nonexperimental populations of the same species. Thus, for example, in the case of the introduction of individuals of a listed fish species into a portion of a stream where the same species already occurs, the introduced specimens would not be treated as an "experimental population" separate from the naturally occurring specimens. On the other hand, specimens of the same species introduced into a portion of a stream separate from any natural population (e.g. when a reservoir or other manmade or natural obstacle acts as a barrier to fish passage) would qualify as an experimental population. If an introduced population overlaps with natural populations of the same species during a portion of the year, but is wholly separate at other times (e.g. during the breeding season or in winter), the introduced population is to be treated as an experimental population at such

times as it is wholly separate. Such a population shall be treated as experimental only when the times of geographic separation are reasonably predictable and not when total separation occurs as a result of random and unpredictable events.

Subsection 2(b) (1) and (2) of S. 2309 clarify that permissible acts that are associated with the establishment of experimental populations are to be encompassed within the category of actions "to enhance the propagation or survival" of a listed species, a category for which the Secretary may issue permits under section 10(a)(1) of the Act. In issuing permits for such actions, the Secretary is subject to the requirement of section 10(d) that issuance will not operate to the disadvantage of the listed species.

Subsection 2(b)(3) directs the Secretary to issue such regulations as are necessary to provide for the identification of experimental populations. This requirement is intended to clarify that any population now in existence which may meet the definition of an experimental population shall be treated as an experimental population only when determined by regulation to be such. Thus, until such time as the Secretary makes an affirmative determination that a particular population is an experimental population, it shall remain subject to the same protections as any other population of the same species.

Subsection 2(b)(3) of S. 2309 also sets forth the restrictions applicable to experimental populations of listed species. All experimental populations, once determined to be such, are to be treated as though they have been separately listed as threatened species. This provision obliges the Secretary to issue such regulations as he deems necessary and advisable to provide for the conservation of the experimental population, just as he now does under subsection 4(d) for any other threatened species.

The purpose of requiring the Secretary to proceed by regulation is to provide a vehicle for the development of special regulations for each experimental population that will address the particular needs of that population. The Secretary is granted broad flexibility in promulgating regulations to protect threatened species. These regulations may even allow the taking of threatened animals. There will be instances where the regulations will allow for the incidental taking of experimental populations, such as the inadvertent taking of experimental fish species by those fishing for other species on the same body of water. Where appropriate, the regulations may allow for the direct taking of experimental populations. For example, regulations pertaining to the release of experimental populations of predators, such as red wolves, will probably allow for the taking of these animals if depradations occur or if the release of these populations will continue to be frustrated by public opposition. The Secretary, acting through the Fish and Wildlife Service or National Marine Fisheries Service, as appropriate, may avoid the need for step-by-step review and promulgation of specific regulations concerning Federal actions by entering into written agreements or memoranda of understanding with other Federal land managing agencies to develop long-term programs for the conservation of said experimental populations.

Section 7 of the Act is to be fully applicable to experimental populations unless the Secretary determines that a particular population is

not essential to the survival of the species as listed. If he determines that it is not, then the population is subject only to subsection 7(a)(1) and those protections of section 7 that apply to species proposed to be listed. Critical habitat may not be designated for such nonessential populations. However, any experimental population that is found on any unit of the National Wildlife Refuge System shall remain subject to the full protection of section 7.

In making the determination whether an experimental population is essential to the survival of the species, the Secretary shall consider whether the loss of the experimental population would be likely to appreciably reduce the likelihood of survival of that species in the wild as listed. If the Secretary determines that it would, the population should be considered essential to the survival of the species. The level of reduction necessary to constitute "essentiality" is expected to vary among listed species and, in most cases, experimental populations would not be essential.

The involvement of State Fish and Wildlife Agencies in the experimental population regulatory process is crucial. In addition, where experimental populations are released on or near private land, the landowners must be fully apprised of the release and the regulations under which the population will be managed.

Subsection 2(b)(3) of S. 2309 would also add a new paragraph (3) to subsection 10(a) of the Act. This new paragraph is intended to clarify the authority of the Secretary to issue permits for actions which result in the incidental taking of listed species, provided that such takings are part of an adequately funded conservation plan to promote the long-term conservation of the species. Thus, a project sponsor whose activities might result in incidental takings could apply to the Fish and Wildlife Service or National Marine Fisheries Service, as appropriate, for a permit to authorize such takings. In conjunction with the permit application, the applicant would be required to develop a conservation plan designed to ensure the long-term survival and enhancement of the species involved. An intra-agency consultation under section 7 would then occur between the Fish and Wildlife or National Marine Fisheries Service office responsible for issuing the permit and the Service office responsible for endangered species conservation. This consultation will ensure that the Service, in issuing the permit, would be in compliance with section 7(a)(2). A major factor involved in determining compliance would be the adequacy of the conservation plan, that is, whether it promotes the long-term conservation of the species and whether there are adequate assurances that the plan will be fully implemented. If these criteria are met, there would be a biological opinion of no jeopardy rendered regarding the issuance of the permit. If the conservation plan were found to be lacking, the biological opinion could specify reasonable and prudent alternatives which could be adopted. In addition, since the standard of promoting the long-term conservation of the species is greater than that of jeopardy, under the authority provided by section 7 of S. 2309 the Secretary could propose alternative measures that could be adopted to allow the project sponsor to meet the section 10(a) standard. Thus, assuming circumstances remain the same and the conservation plan is conducted in a manner that is within the scope of consultation, the issu-

ance of the section 10 permit would assure that the applicant and any subsequently involved Federal agency would also be in compliance with section 7 of the Act, and further consultation under section 7 would not be required.

In some cases, the overall effect of a project can be beneficial to a species, even though some incidental taking may occur. An example is the development of some 3000 dwelling units on the San Bruno Mountains near San Francisco. This site is also habitat for three endangered butterflies. The project developer, in cooperation with the U.S. Fish and Wildlife Service and State authorities is developing a conservation plan for the protection and enhancement of the butterflies' habitat, to be financed through an assessment on home owners. Absent the development of this project these butterfly recovery actions may well have never been developed. The proposed amendment should lead to resolution of potential conflicts between endangered species and the actions of private developers, while at the same time encouraging these developers to become more actively involved in the conservation of these species.

### SECTION 3. COOPERATION WITH THE STATES

This section of the bill would amend section 6 of the Act to increase the maximum Federal share of grants to States from 66⅔ percent to 75 percent for single State projects and from 75 percent to 90 percent for multi-State projects. The purpose of this amendment is to make the endangered species grant program consistent with existing Federal responsibilities under the Federal Aid in Wildlife Restoration Program (Pittman-Robertson) and the Federal Aid in Fish Restoration Program (Dingell-Johnson). It is appropriate that the Federal Government provide the same support and encouragement to states for endangered species programs.

### SECTION 4. LISTING PROCESS

The cornerstone of effective implementation of the Endangered Species Act is the process to determine which species should be listed as endangered or threatened and which listed species should be reclassified or removed from the lists (delisted). Listing is critically important because it sets in motion the Act's other provisions, including the protective regulations, consultation requirements, and recovery efforts.

A considerable number of species have been identified by the U.S. Fish and Wildlife Service as "candidates" for eventual designation as endangered or threatened. The total number exceeds 3,000, of which more than 1,800 are plant species with data indicating they probably should be listed. Because of the length and complexity of the formal listing procedures now in force, many such species are likely not to be accorded recognition and full protection for some years, despite convincing evidence that such protection is warranted. Failure to list species in a timely manner precludes early identification of possible or probable conflicts. Identification of such conflicts at the earliest stage possible in project planning provides an opportunity to make minor modifications that may remove the potential for conflict.

The listing process under section 4 of the current law has been seriously hampered since the 1978 amendments to the Act. These amendments require the Secretary "to the maximum extent prudent" to specify at the time a species is proposed, any habitat of the species which is then considered to be critical. The 1978 amendments indirectly introduced economic considerations into the listing process by requiring the Secretary to consider the economic impact of specifying the habitat. This is one of only two instances in the Act where economic impact is to be considered (the other relates to the section 7(h) exemption process).

Section 4 of S. 2309 would make various amendments to section 4 of the Act. The principal purpose of these amendments is to insure that decisions pertaining to the listing or delisting of species are based solely upon biological criteria and to prevent non-biological considerations from affecting such decisions. These amendments are intended to expedite the listing process and to ensure prompt action in determining the status of the many species that have already been identified by the Secretary of the Interior as likely to be eligible for listing.

Section 4(a) (2) of the proposed amendments requires the Secretary, to the maximum extent prudent and determinable, to designate the critical habitat of any endangered or threatened species concurrent with the determination of the status and the lising of the species. During the hearings on these amendments, the Administration's witnesses, among others, expressed much concern that critical habitat designations may delay the listing process if insufficient information exists at the time of listing to determine the critical habitat of a species.

At the present time, the Secretary is required to withdraw a proposal from further consideration if he fails to make a final determination with respect to the status of the species within two years after it has been proposed for listing or delisting. Since 1978, this requirement has caused the Secretary to withdraw numerous listing proposals solely because the Secretary has been unable, within the prescribed two year period, to complete the economic analysis of critical habitat designation. Other proposals have been withdrawn because the scientific information necessary to designate critical habitat has been unavailable. Under the law as it would be amended, the Secretary will be required to list a species for which sufficient information justifying its listing is available within one year after it is proposed for listing. These amendments would require the Secretary to designate critical habitat concurrent with listing unless the Secretary determines that such designation is imprudent or that insufficient information exists to determine the species' critical habitat.

If the Secretary finds that critical habitat is not determinable based on the best scientific and commercial data available at the time of listing, the Secretary shall proceed with the listing and state his finding in the listing rulemaking. The Secretary must continue to gather the information necessary to determine the species' critical habitat and once adequate information is obtained, promulgate regulations designating the habitat.

Similarly, nothing in these proposed amendments would prevent the Secretary from designating critical habitat of species listed before the date of enactment of these amendments.

When designating critical habitat, the Secretary is expected to comply with the statutory definition and to designate "specific areas." Several witnesses suggested that instead of designating such "specific areas" the Secretary was designating "geographical ranges." Section 3(5)(c) of the Act states as a general rule that "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."

Section 4(a)(3) of the proposed amendments to the listing process makes clear that listing determinations must be based solely on the factor set forth in section 4(a)(1) of the Act. This amendment would preclude the Secretary from considering economic or other non-biological factors in determining whether a species should be listed or delisted. Listings or delistings must be based solely on biological considerations. Only in this way will the endangered and threatened species lists accurately reflect those species that are or are likely to be in danger of extinction.

The proposed amendments would continue to require the Secretary to consider fully for listing those species that States or foreign countries have designated or identified as in need of protection. This requirement applies regardless of the distribution of such species.

The proposed amendments would streamline the listing process by reducing the time periods for rulemaking, consolidating public meeting and hearing requirements, and requiring only if practical, publication of proposed regulations in local newspapers. The proposed amendments would require the Secretary to allow the public a minimum 60-day comment period on a proposed regulation and an opportunity to request within 45 days after the date of the general notice of proposed rulemaking, a public hearing on the action. If requested, the Secretary must promptly conduct a public hearing on the action. The public hearing should be conducted in a timely manner to allow for meaningful consideration of all information gleaned during the hearing before publication of the final determination. The Secretary shall determine the procedures necessary for such hearing.

As part of the public comment process, the Secretary would be required to provide to the State agency responsible for the conservation of fish or wildlife or plants in each State in which the species is believed to occur actual notice of any proposed regulation concerning the listing of such species. He would also be required to invite the comment of that agency on the proposed regulation. The involvement and advice of such State agencies in the Federal regulatory process is crucial and must not be ignored.

The proposed amendment to the petition process (section 4(a)(3) of S. 2309) alter the evidentiary standard petitioners must satisfy to warrant a status review of the species proposed for listing or delisting. The Act previously required the Secretary to determine whether a petitioner had presented substantial evidence justifying a status review. Concern was expressed at the hearings that, particularly with respect to the economic considerations required for critical habitat designations, petitioners may be required to present economic information relevant to the proposed action. The amendments make clear that petitioners would be required to present only biological, not economic information.

The proposed amendments would not change the amount of information needed to warrant a status review of the species. As under the existing provisions, the petitioner need only present information sufficient to indicate that an addition to, or removal from, the lists may be warranted and thus, that a status review of the species should be conducted.

In several ways, these amendments will replace the Secretary's discretion with mandatory, nondiscretionary duties. For example, under current law, if a petition presents substantial evidence warranting a review of the status of a species, the Secretary is to undertake such review. However, the statute imposes no deadlines within which such review is to be completed. In practice, such status reviews have often continued indefinitely, sometimes for many years. These amendments will force action on listing and delisting proposals by requiring that the Secretary:

(1) promptly, after receipt of a petition, determine and publish a finding whether the petition presents substantial scientific information;

(2) within 90 days of receiving such a petition, the Secretary must conduct a review of the status of the species; and

(3) within 12 months of receiving the petition, the Secretary must publish in the Federal Register either:

(a) a proposed regulation to implement the petitioned action; or

(b) a finding that the petitioned action is, not in fact, warranted; or

(c) if he is actively working on other listing actions, actions that concern species facing a greater degree of threat than the species addressed in the petition, he must publish a finding that such other actions preclude his proposing the petitioned action at that point in time.

If the Secretary determines that a petition does not present substantial evidence that the petitioned action may be warranted, or that the petitioned action is not warranted, such negative determinations shall be subject to judicial review. The object of such review is to determine whether the Secretary's action was arbitrary or capricious in light of the scientific information available concerning the petitioned action.

If, within 12 months of receiving a petition that warrants the publication of a proposed regulation, the Secretary determines that he is unable to propose such action at that time or, if able to propose the action, unable to make a final determination within the statutorily specified and judicially enforceable time frame, he will be excused from publishing a proposed regulation provided he satisfies several, limited conditions.

First, he must be actively working on other listing actions, actions that concern species facing a greater degree of threat than the species addressed in the petition. If a petition concerns a population facing a high degree of threat, active work on a full species or subspecies facing an equally high degree of threat shall take precedence. Similarly, petitions concerning a full species or subspecies facing a high degree of threat shall take precedence over populations facing an

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equally high degree of threat. Preferential treatment for "higher life forms", species of a higher taxonomic order, has no basis in the Act nor in these amendments. The Act provides for equal legal protection of all life forms, including plants and invertebrates, as endangered or threatened species. Biologically, it makes sense to treat all taxonomic groups equally or even to place some special emphasis on protecting plants and invertebrates since they form the bases of ecosystems and food chains upon which all other life depends. The Act's stated purpose is to conserve ecosystems.

Second, the Secretary must determine and publish a finding that such other work which has resulted in pending and imminent proposals actually precludes his preparing the petitioned action at that point in time. Nothing in these amendments would prevent the Secretary from proposing such petitioned action at a later point in time. Similarly, a determination that a petitioned action shall not be proposed will not prevent an interested party from resubmitting a petition.

Finally, the Secretary must present evidence that he is, in fact, making efficient and speedy progress in the process of listing such other species. With more than 3,000 species already identified as "candidates" for designation as endangered or threatened, the Secretary should make considerably more progress in the listing process than he has during the past 14 months. As are the determinations discussed earlier, these too shall be subject to judicial review. In cases challenging the Secretary's claim of inability to propose an otherwise warranted petitioned action, the court will, in essence, be called on to separate justifications grounded in the purposes of the Act from the footdragging efforts of a deliquent agency.

To ensure that proposals, whether developed in-house or by petition, are acted upon quickly, these amendments would shorten the allowable time for final action from 2 years to one year from date of proposal. The one-year period within which the Secretary must make a final determination may, under limited circumstances, be extended to eighteen months. Such extension is permissible only if the Secretary finds that there is substantial disagreement regarding the sufficiency or accuracy of the information available with respect to the listing or delisting proposal. Extensions to allow additional time to conduct economic or other analyses are not permissible.

At the end of such 12 month period (or 18 month period, if an extension occurs), the Secretary must make a final determination with respect to the listing proposal. He must determine, on the basis of the information then available, either that the species should be listed or delisted, or that the proposal for listing or delisting should not be promulgated as a final regulation. If he determines that a final regulation is not warranted because of insufficient evidence to promulgate the proposed action, that determination shall be subject to judicial review to determine whether the Secretary's determination was arbitrary or capricious in light of the scientific information available concerning the proposed action. If he determines that a final regulation is warranted, he must publish the final regulation prior to the expiration of the prescribed twelve or eighteen month period.

Although amended section 4(f)(5) of the Act would require that the Secretary make a final determination with respect to any proposed

listing action within one year after such proposal is published, this requirement shall not apply to any listing proposal outstanding as of the date of these amendments. At the current time, there are approximately 20 listing proposals outstanding, all of which are already more than a year old. Final determinations with respect to these proposals should be made within the time limits prescribed by current law, without regard to these amendments. Proposals previously made and withdrawn pursuant to existing Section 4(f)(5) may be reproposed if substantial evidence warrants such reproposal whether or not such evidence post-dates the withdrawal of such proposals.

The proposals previously withdrawn pursuant to existing section 4(f)(5) were withdrawn without any final determination of the status of the species and because of the inability to complete the burdensome procedures from which the Committee's bill is designed to give relief. Accordingly, such species that are biologically eligible for reproposal may be reproposed without regard to when the biological evidence was developed.

Section 4(b) of S. 2309 would amend the citizen suit provision of the Act to authorize actions against the Secretary for failure to perform the acts and duties that are imposed by section 4(a) of S. 2309. Unlike the situation under current law, the Secretary cannot simply refuse to act. He must make decisions within specified periods of time and he will be accountable for failure to make timely and defensible decisions.

The amendments to section 4 of the Act would also substitute the word "recreational" for the word "sporting" in amended subsection 4(a)(1)(B). Subsection 4(a)(1) of the Act requires the Secretary to consider whether a species is endangered or threatened because of any of several factors set forth there. The summary of factors identifield in section 4(a)(1) is intended to be comprehensive, and to exclude no possible cause of endangerment. This is made clear by amended subsection 4(a)(1)(E), which requires the Secretary to consider, in addition to the specific factors identified in paragraphs (A) through (D), any "other natural or manmade factors affecting" the continued existence of any species. Thus, the change in the wording of subsection 4(a)(1)(B) is not intended to limit the authority of the Secretary to consider whether a particular species may be endangered or threatened for any reason. The change in wording is not intended to have any substantive effect. Testimony received by the Committee suggested that the word "sporting" was perceived as an insult to sport hunters. The Endangered Species Act is not meant to imply that any lawful consumptive use of wildlife is improper. The license-buying sportsman is recognized as an active and dependable conservationist who believes in protection of endangered species and who finances State endangered species protection programs. Improperly regulated hunting or illegal hunting, however, can seriously and adversely affect wildlife populations. Wildlife management practices that are not based on proper biology and lax enforcement of hunting regulations shall not be condoned or tolerated.

The Committee received testimony that one serious problem which has not been resolved administratively involves myriad wildlife lists one is compelled to review to ascertain compliance with the law. The

Department of Interior has yet to publish a consolidated list indicating by species the various laws and/or regulations that are applicable. The lists for CITES, the Endangered Species Act, migratory bird treaties, etc., as well as various regulations overlap and often lead to confusion. The Department of the Interior should sanction a privately published consolidated list or publish their own consolidated wildlife list and code it to indicate the applicable laws and regulations.

The Committee also received testimony stating that "the Secretary has listed some foreign species as endangered throughout their entire range without considering whether their population status varies from country to country." There may be nations where a combination of a healthy population and effective management programs permit the sport hunting of such species without adversely affecting its status. The failure to recognize this may result in the foreign nations being denied much-needed revenues derived from license fees that are used to fund their wildlife conservation and management programs.

If the Secretary is in receipt of biological information from a foreign nation with respect to a resident game species listed as "endangered", he should evaluate the status of such species within the country in question. The evaluation should consider the effectiveness of management programs such as artificial propagation, and whether these programs permit sport hunting of listed species in nations where it otherwise might be detrimental to the species. The evaluation should also determine whether the specific country in question has a management program for the species, whether the species' population can sustain a sport hunting harvest, and whether the sport hunting enhances the survival of the species. If the Secretary determines that sport hunting in such country will assist in the conservation of a listed species, he should issue appropriate regulations to facilitate the import of sport-hunted trophies of such specimens.

The above-mentioned criteria should be taken into account in future listings of game species as well.

### SECTION 5. EXEMPTION PROCESS

The 1978 amendments to section 7 of the Endangered Species Act created a process by which actions authorized, funded, or carried out by Federal agencies could be exempted from the provisions of the Act. Additional minor changes were made to this process in the 1979 amendments to the Act. Section 5 of S. 2309 contains a number of amendments to streamline the exemption process. The proposed changes are procedural only, they are not intended to alter the substantive requirements or standards that were adopted in 1978.

The exemption process was designed to resolve endangered species conflicts after consultation has been exhausted and after other administrative remedies have resulted in final agency action. The basic premise of the 1978 amendments, the 1979 amendments and S. 2309 is that the integrity of the interagency consultation process designated under section 7 of the Act be preserved. Many, if not most, conflicts between the Endangered Species Act and Federal actions can be resolved by full and good faith consultation between the project agency and the Fish and Wildlife Service or the National Marine Fisheries

Service, as appropriate. Only in those instances where the consultation process has been exhausted and a conflict still exists should the Endangered Species Committee consider granting an exemption for a Federal action.

Under current law, when an exemption application is filed with the Secretary responsible for the biological opinion concerned, a three-member Review Board is formed to make a full examination of the consultation that has been carried out. It is the function of the Review Board to determine by majority vote within 60 days after its appointment: (1) whether an irresolvable conflict exists; and (2) whether the exemption applicant and the Federal agency concerned have:

(a) carried out their consultation responsibilities in good faith and have made "a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action" which would avoid jeopardy to the species or adverse modification to its critical habitat;

(b) conducted a biological assessment, if required; and

(c) refrained from making an irreversible or irretrievable commitment of resources.

If the Board finds that the applicant or Federal agency concerned has failed to meet any of the above mentioned exemption criteria, no exemption can be granted and the finding is considered a final action under the Administrative Procedure Act. If, however, the Board makes a positive finding concerning the applicant's eligibility, it proceeds to prepare a report for the cabinet-level Endangered Species Committee, to be presented within 180 days following the Board's findings.

Section 5 of S. 2309 amends section 7(g) of the Act by deleting all references to a Review Board. The functions of the Review Board would be carried out by the Secretary. The finding concerning the applicant's eligibility is to be made by the Secretary responsible for the biological opinion concerned. In those instances where both the Department of the Interior and the Department of Commerce have issued negative biological opinions for the same agency action, the Secretaries of the Interior and Commerce shall jointly review the application and render a finding concerning the applicant's eligibility for an exemption.

Section 7(g), as amended by S. 2309, would not require a specific finding as to whether an "irresolvable conflict" exists. This requirement was deleted because all conflicts are "resolvable" whether by accommodation, exemption or otherwise. The purpose of the original requirement was to mandate close cooperation between a Federal action agency on the one hand and the Fish and Wildlife Service and National Marine Fisheries Service on the other. Under current law, an action cannot be considered for an exemption unless every effort has been made to resolve the conflict. The same would be true under the law as it is proposed to be amended by S. 2309. Failure to make every effort to resolve the conflict is evidence of failure to carry out consultation responsibilities in good faith. The Endangered Species Committee is designed to function as an administrative court of last resort. Circumstances can change, procedures can be overlooked, and options may remain unexplored. In such situations, the Secretary should reject an

application until all other administrative avenues have been pursued in good faith and resulted in final action.

Under current law, the Review Board must determine as a threshold matter whether there has been an irreversible or irretrievable commitment of resources. If the Board finds that there has been such a commitment of resources, the application is denied at the outset. Such a determination may involve complex questions of fact and data that may not be readily available. These amendments would reduce from 60 days to 20 days the time available to make the initial determination concerning the applicant's eligibility. In some cases, it may not be possible to make the determination concerning commitment of resources within 20 days after receipt of the application. Therefore, section 5 of S. 2309 would require the Secretary to determine whether an irreversible or irretrievable commitment of resources has been made "to the extent determinable within the timeframe provided." If the Secretary finds that such a commitment has been made, no exemption can be granted and the finding is considered a final action. If the Secretary does not make such a finding, for whatever reason, the matter must be addressed in the report to the Endangered Species Committee. If the Committee concludes that an irreversible or irretrievable commitment of resources has been made, it may not grant an exemption.

Under these amendments, the Secretary shall, if he determines that the Federal agency concerned and the exemption applicant have met the threshold requirements, conduct hearings and prepare the report for the Endangered Species Committee in consultation with the members of that Committee. The term "in consultation with" in this instance does not connote the formal interagency consultation process provided for in section 7. Rather, it is intended that in preparing the report, the Secretary or his staff coordinate closely with Members of the Endangered Species Committee to keep them regularly informed of the progress of the report and to provide them with the opportunity to participate in the collection of information, analysis and drafting of the report.

The conduct of hearings and preparation of the report for the Endangered Species Committee would, pursuant to these amendments, be the responsibility of the Secretary of the Interior. However, to avoid the appearance of a conflict of interest, the Secretary of Commerce would be responsible for the conduct of hearings and preparation of the report when the biological opinion concerned was issued by the Department of the Interior's Fish and Wildlife Service. Similarly, when a biological opinion was issued by the Department of Commerce with respect to an action of an Interior Department agency, or visa versa, the Secretaries shall jointly conduct hearings and prepare the report.

These amendments would reduce from 180 days to 150 days the time available to make the report for the Endangered Species Committee. Notwithstanding this reduction in time, it will be practicable in most, if not all, cases to conduct the required hearing in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5, United States Code. A formal adjudicatory hearing to review the question of the exemption will provide a record of facts that has been compiled by a neutral party, the presiding administra-

tive law judge. The record of the proceedings is to be transmitted to the Endangered Species Committee along with the Secretary's report.

The Committee is to meet at the call of its Chairman, the Secretary of the Interior. Under current law, the Committee has 90 days after receiving the report of the Review Board to decide whether or not to grant the agency action an exemption. These amendments would reduce the 90 day period and provide that the Committee shall have 30 days after receiving the report of the Secretary to render a decision. The Committee's determination must be based on the record developed by the administrative law judge, the report prepared by the Secretary, and any record developed by the Committee itself. Although the Committee has the authority to receive testimony and evidence, it is not expected to conduct additional formal adjudicatory hearings.

The proposed amendment to section 7(e)(10) of the Act would delete the requirement that a Committee member's representative be a Presidential appointee. The representative, however, should be a Federal officeholder.

In reducing the time allowed for consideration of an application, it is not intended that the quality for the deliberations be diminished or that unrealistic time constraints be placed upon members of the Endangered Species Committee. It is intended that the Secretary, in preparing the report, will keep the members of the Committee fully informed and will provide all relevant documents to them so that they may be thoroughly familiar with the background evidence when the Secretary's report and the hearing record are provided. Full consultation and the provision of background information while the Secretary is preparing the report will ensure that an informed and reasoned decision can be made, with full knowledge of the facts. within the time frame allotted.

SECTION 6. CONSULTATION PROCESS

This section would amend section 7(b) of the Act. At the present time, consultation between the Secretary acting through the Fish and Wildlife Service or the National Marine Fisheries Service as appropriate and the Federal agency must be concluded within 90 days after initiation, unless extended for a longer period that is mutually agreeable to the Secretary and the Federal agency. In the case of Federal actions that involve the issuance of permits or licenses to private parties, the applicant for such permit or license has no statutory authority to object to the extension of consultation. The result may be than consultation will be extended for a sufficiently long period that the permit of license applicant will, as a practical matter, be unable to undertake the action for which he seeks a permit or license. To avoid that result and to provide some certainty for the applicant, while at the same time allowing the Secretary and the Federal agency sufficient time to gather the necessary information to render an informed biological opinion, subsection 7(b)(1), as amended, would provide that consultation may be extended beyond the normal period of 90 days by mutual agreement of the Secretary and the Federal agency involved, but if such extension is for more than an additional 60 days, the concurrence of the

affected permit or license applicant, if any, must be obtained for such additional extension.

When an extension is agreed to, the Secretary would be required to specify what additional information is needed to complete consultation and on what date the biological opinion can be rendered.

Permit or license applicants should, in most cases, recognize the advantage to them of concurring in such further extensions when those extensions are necessary to gather the additional biological information necessary to render an informed biological opinion as to whether issuance of the permit or license would comply with the requirements of Section 7(a)(2). When biological opinions are rendered on the basis of inadequate information, the Secretary and the agency have a continuing responsibility to develop adequate information. If a biological opinion concludes on the basis of inadequate information that an agency action will comply with the requirements of section 7(a)(2), the agency may decide to proceed and, for example, issue the permit or license. However, such action is taken with the understanding that new information may be developed, consultation reinitiated and a biological opinion may conclude that the action would violate section 7(a)(2). In such a case, the applicant would have committed resources at his own risk with regard to any future exemption application pursuant to section 7(g).

Nothing in this proposed amendment is intended to affect the definition of "agency action" as interpreted by the courts.

Consultation under section 7 of the Act is intended to provide a process by which potential conflicts between Federal activities and endangered species protection can be identified and resolved. Most, if not all, such conflicts can be remedied through proper cooperation between local, State, and Federal authorities. Further, emphasis should be given throughout the consultation process, including suggestions for alternatives under section 7(b) and biological assessments under section 7(c), to opportunities for participation by permit applicants, if any. Such involvement by permit applicants increases the likelihood that conflicts will be resolved in a timely manner and that their method of resolution will be equally acceptable to all interested parties. The ultimate responsibility for compliance with section 7, however, continues to remain with the Federal agencies.

SECTION 7. (RELATIONSHIP BETWEEN SECTIONS 7 AND 9 OF THE ACT)

Under the existing provisions of the Act, Federal agencies that receive favorable biological opinions which conclude that the agency action would not violate section 7(a)(2) remain subject to the section 9 prohibition against taking individual specimens of endangered species of fish or wildlife. Should a taking occur, therefore, the offending party may be subjected to citizen suits or civil or criminal penalties for violating section 9 of the Act.

Section 7 of S. 2309 would address this problem by amending section 7(b) of the Act to require the Secretary, in cases where he has concluded that the agency action would not violate section 7(a)(2), to provide a written statement specifying (1) the extent of take incidental to the agency action that would not violate section 7(a)(2); and (2)

those reasonable and prudent measures that must be followed to minimize such takings. If a Federal or private action that is in compliance with the measures specified to minimize takings results in the taking of specimens of a species that was the subject of the biological opinion, such action will not be considered a "taking" for the purposes of section 9 of the Act. Actions that are not in compliance with the specified measures, however, remain subject to the prohibition against takings that is contained in section 9.

These provisions would preserve the integrity of the current section 7 consultation process as well as the integrity of the Secretary's biological opinions. The amendment would not lessen in any way an agency's obligation under section 7(a)(2) to insure that its action is not likely to jeopardize the continued existence of a listed species or to result in the destruction or adverse modification of critical habitat.

The amendment would, however, authorize the Secretary to issue, in addition to issuing a biological opinion, a written statement that places mandatory and enforceable controls on the means and level of incidental takings that may be allowed with respect to the agency action. In no instance, however, may the Secretary authorize takings which would result in violation of Section 7(a)(2). The written statement concerning incidental takings should be appended to the biological opinion.

Under the proposed amendment, the Secretary is required to specify the extent of incidental take that would not violate the Section 7(a)(2) standard. The phrase "extent of take" is used to allow the Secretary flexibility in expressing the point at which incidental takings might result in a violation of Section 7(a)(2). In some cases, the Secretary may determine that it is inappropriate for the "extent of take" to be expressed in terms of numbers of individuals, or numbers of parts, products, eggs or offspring of individuals. In such cases, "extent of take" may be expressed as incidental takings which occur when the action is in compliance with the measures specified to minimize takings. It is not intended that a quota necessarily be established, but rather that Federal agencies and permit or license applicants, if any, be provided with notice of the point at which incidental takings would result in possible violation of Section 7(a)(2) of the Act. If the specified extent of the take is exceeded, the Federal agency or permit or license applicant, if any, must immediately reinitiate consultation.

The proposed amendment would also require the Secretary to specify those reasonable and prudent measures that must be followed to minimize takings of individuals or parts, products, eggs or offspring of individuals of the species concerned. Such measures shall be mandatory. The Secretary may use discretion in determining such measures, which may include reporting and monitoring requirements. The proposed amendments are not intended to provide a liberal exemption from the taking prohibitions of the Act for a large class of activities. Rather, only a narrow set of activities that are conducted in compliance with the specified reasonable and prudent measures shall be exempt from the taking prohibitions of the Act. Any agency or applicant taking a listed species that was not the subject of the biological opinion or taking any listed species by actions that are not in compliance with the measures specified by the Secretary shall be

liable for such takings under the Act. In enacting the Endangered Species Act in 1973, Congress was well aware that one of the most effective tools for conserving endangered wildlife was a proscription on taking. The proposed amendment is not intended to weaken this tool; rather, it is intended to provide Federal agencies and applicants with some certainty as to whether they may be liable for violating the taking provisions of the Act if their activity complies with Section 7(a)(2) and the action agency or applicant has in good faith taken all reasonable and prudent steps necessary to minimize or avoid incidental takings.

Nothing in this amendment is intended to void more restrictive State laws or regulations respecting the particular species, and the provisions of Section 6(f) are in no way modified by the amendment.

SECTION 8. CONVENTION IMPLEMENTATION

Section 8 of S. 2309 adds a new paragraph to section 8A of the Act to overrule the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Defenders of Wildlife, Inc.* v. *Endangered Species Scientific Authority*, 659 F. 2d 168 (D.C. Cir. 1981). The court held that a valid no-detriment finding concerning export of bobcat pelts cannot be made under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES or the convention) without a reliable estimate of the bobcat population in a State. The ruling of the court is not based on sound wildlife management.

This amendment makes clear that, with respect to wildlife species, the Secretary is required to base export determinations and advice upon the best available biological information derived from professionally accepted practices used in wildlife management. In the case of the bobcat, as with most other wild animal populations, the resource is monitored by a variety of techniques that yield information used in evaluating the condition of a population. As these data are accumulated over time, they reflect trends and call attention to changes in the population. Habitat information, indices of population size, age and sex structure, and harvest information are all used to evaluate population status. If population estimates are available for a particular species, such information shall be considered with other data in making export decisions. The Secretary shall not, however, be required to make, nor may he require any State to make, estimates of population size as a prerequisite to making the determinations and rendering the advice required by Article IV of the Convention. Provided that there is other data derived from professionally accepted wildlife management practices establishing that export will not be detrimental to the survival of the species, no exports shall be disallowed for the reason that population estimates are not available. If available population estimates contradict other information derived from professionally accepted wildlife management practices, the Secretary shall consider all information in making his export decision. Effective on the data of enactment of this Act, the Secretary's export decisions shall be based upon the criteria set forth in this amendment. Such decisions may be rendered with respect to future export of specimens that have been lawfully taken prior to the date of enactment of this Act.

The Convention extends protection to certain species which are involved in international trade but, with respect to many listed species which are native to the United States, primary authority for management and protection resides in the States. With respect to such species, the Secretary's no-detriment findings are properly based on information generated by State agencies possessing primary management authority. The Secretary is not required to independently generate data, on which to base export decisions, which is being collected by State biologists.

In making Convention findings, the Secretary may require the establishment of target harvest levels and tagging procedures to ensure that export of any species will not be detrimental to the survival of the species.

Prior to 1979, the Endangered Species Scientific Authority (ESSA), an interagency committee, operated as the United States scientific authority with responsibilities under the Convention. The 1979 amendments to the Act, however, abolished ESSA and transferred that authority to the Secretary of the Interior acting through the United States Fish and Wildlife Services (FWS). A new organization, the International Convention Advisory Commission (ICAC) was created to advise the Secretary primarily on scientific matters relating to the Convention.

Since fiscal year 1982, funding for ICAC has been eliminated and ICAC no longer has any staff. The staff of FWS can and should advise the Secretary on scientific matters relating to the Convention. Many of the useful functions that were performed by ICAC are already being performed by the various offices of FWS. For example: Law Enforcement is continuing the monitoring of imports and exports; Office of Scientific Authority is reviewing draft questionnaires for permit applicants; Wildlife Permit Office gets continuing input from all involved Federal agencies through the Management Authority Contact Group (this group meets monthly and covers species and non-species Convention issues); public input on Convention positions is guaranteed by regulation; and public input on permit applications concerning species which are also endangered species is guaranteed through notice in the Federal Register.

The United States is a leader in international conservation efforts. We have a long history in this respect and one of the most important examples of our leadership is the Convention. It was a United States initiative and, through the Endangered Species Act, the United States has responsibly implemented the requirements of the Convention and has encouraged other nations to do likewise. It is important for us to retain leadership in order to be able to guide conservation along practical, balanced, scientific lines which are acceptable to conservationist and commercial interests alike, and which recognizes the divisions between Federal, State and local responsibilities. The amendments contained in section 8 of S. 2309 do not weaken our leadership role and are consistent with our international obligations under the Convention. It is important to note that they would retain the independent authority of the Secretary of the Interior, acting as the United States national scientific authority, to make "no detriment" findings as required by the Convention.

SECTION 9. ENFORCEMENT

The Attorney General of the United States may not be authorized to seek injunctions under the Act. Although section 11 of the Act accords private citizens the right to seek injunctive relief, no such Federal enforcement authority is explicitly provided to the Attorney General. Section 9 of S. 2309 explicitly provides such authority.

Injunctions provide greater opportunity to attempt resolution of conflicts before harm to a species occurs. Because courts are reluctant to infer a right of action on behalf of the government absent a specific congressional grant of authority, however, the Department of Justice has chosen not to pursue this form of relief under the Act. The ability to enjoin a violation of the Act rather than the ability only to prosecute a completed violation will better serve the interests of the public, the potential violator and the potentially harmed species.

SECTION 10. MISCELLANEOUS

This section deletes an outdated provision of the law relating to the Tellico and Grayrocks Dam projects, clarifies the scope of exiting statutory exceptions to the prohibitions contained in section 9 of the Act, and adds a policy statement to current law.

The language of subsections 9(b)(1) and 9(b)(2) of the Act, "this section shall not apply to," exempt certain pre-Act wildlife specimens and certain raptors from the entirety of section 9. Such language is overly-broad. Section 9 of the Act includes prohibitions in subsection 9(c) that implement the Convention on International Trade in Endangered Species (CITES) as well as the designated port and reporting requirements of subsection 9(d). The international obligation of the United States to apply CITES to these species should not be overriden. In addition to preventing the United States from meeting its international obligation, such an overly-broad interpretation could cause problems for persons engaging in legitimate transactions. Under current law, the Federal Government may not have the authority to issue CITES permits for specimens covered by subsection 9(b)(1) and 9(b)(2). Without the appropriate permits from the United States, other countries may not allow the importation of such specimens from the United States.

Subsections 10(b) and 10(c) of S. 2309 would correct these problems by: (1) allowing the United States to meet its international obligation under CITES: (2) authorizing CITES permits to be issued for such specimens; and (3) retaining the designated port and reporting requirements, which are a cost-efficient method of data gathering and control for CITES and other laws enforced by the Federal Government.

Subsection 10(b) of S. 2309 would also resolve a conflict between two Federal circuit court opinions regarding the applicability of the prohibitions of section 9 of the Act to pre-Act wildlife held in the course of a commercial activity after December 28, 1973.

In the case of *United States* v. *Kepler*, 531 F.2d 796 (6th Cir. 1976), the U.S. Court of Appeals for the Sixth Circuit ruled that the exemption did not apply to wildlife transported in the course of a commercial

activity in 1974, even though the wildlife may have been held for noncommercial purposes on December 28, 1973.

In the case of *United States* v. *Molt*, 624 F.2d 1092 (3rd Cir. 1980), however, the United States Court of Appeals for the Third Circuit held that the pre-Act wildlife clause renders the Act's prohibitions unduly vague when applied to wildlife held commercially after December 28, 1973. The majority of the court in *Molt* ignored *Kepler* and refused to consider the exemption's legislative history. Focusing instead on the syntax of the exemption, the majority in *Molt* noted that the language of the exemption stating its inapplicability to wildlife "held in the course of a commercial activity" was separated from the language stating its applicability to wildlife held in captivity on December 28, 1973, by only a semicolon. The majority concluded that the phrase, "held in the course of a commercial activity," could be read as referring only to December 28, 1973, and, therefore, that the Act failed to give sufficient notice that its prohibitions applied to wildlife held commercially after that date.

The Third Circuit's *Molt* decision is wrong on the law and, if followed, will open a large loophole in the Act's regulatory scheme and have significant adverse effects on the endangered species program. Under the *Molt* decision, defendants charged with a violation of the Act will merely have to produce some evidence that on December 28, 1973, their wildlife was in a private collection or otherwise held for noncommercial purposes. Such evidence is virtually impossible to rebut and will become progressively more difficult as the years progress.

To clarify the pre-Act exemption, subsection 10(b) of S. 2309 would amend subsection 9(b)(1) of the Act. The interpretation of the Court of Appeals for the Sixth Circuit in *United States* v. *Kepler* is adopted as the proper scope of subsection 9(b)(1). The amendment would also clarify that with regard to species that are listed pursuant to section 4 of the Act subsequent to December 28, 1973, the date of enactment of the Act, the provisions of subsection 9(b)(1) become applicable on the date of publication of a final regulation adding such species to the list.

Subsection 10(d) of S. 2309 adds a new paragraph to subsection 2(c) of the Act, the statement of congressional policy. This amendment is not intended to and does not change the substantive or procedural requirements of the Act with respect to the conservation of endangered or threatened species, nor is the amendment intended to alter in any way any provision of State law, regulation, or rule of law, or of any, interstate compact covering the appropriation, use, or diversion of water. Rather, the purpose of the amendment is to recognize the individual States' interest and, very often, the regional interest with respect to water allocation. The policy statement contained in this amendment recognizes that most of the potential conflicts between species conservation and water resource development can be avoided through close cooperation between local, State and Federal authorities. The Committee amendment to the Subcommittee version of this amendment was not based upon agreement or disagreement with the issues addressed therein. Rather, the provision

adopted by the Committee more accurately reflects the intent of the original amendment to provide a statement of policy and not an interpretation of law.

SECTION 11. REMOVAL OF PLANTS

Section 11 of S. 2309 would amend section 9 of the Act by adding a provision to prohibit the removal and reduction to possession of any endangered plant that is on Federal land. Current law prohibits the taking of any endangered species of fish or wildlife. It does not, however, prohibit the taking of endangered plants. This amendment would make it unlawful to remove and reduce to possession any endangered plant from an area where it is found on Federal land. For example, the collection of such plants from National Park or Bureau of Land Management lands would now be prohibited. It is not necessary that the plant be entirely removed from Federal land for a violation to occur. Removal from the particular location on Federal land where it was located is prohibited. It is important to note that section 3(14) of the Act defines "plant" as any member of the plant kingdom, including seeds, roots and other parts thereof. Thus, removal of any parts or cuttings would be prohibited.

Unlike the section 9 provision that prohibits the taking of any endangered fish or wildlife, including harm which may occur as a result of habitat modification, such harm to species of plants would not be within the scope of the prohibition added by this amendment. Similarly, removals from areas other than those within Federal lands would not be prohibited.

SECTION 12. AUTHORIZATION OF APPROPRIATIONS

Section 12 would authorize appropriations for the Department of the Interior, the Department of Commerce and the Department of Agriculture at existing levels for fiscal year 1983, 1984, and 1985.

The Department of the Interior would receive $27 million for each year, with the Department of Commerce and the Department of Agriculture receiving $3.5 million and $1.85 million, respectively, for each fiscal year.

In addition, section 12(b) of the bill would authorize appropriations of $6 million for State programs for each of the fiscal years 1983, 1984 and 1985. In 1973 Congress made clear that successful development of an endangered species program would depend on a good working relation between Federal and State wildlife agencies. The legislative history of the Act clearly recognizes that the Federal Government has directed new, innovative and expensive programs on the States and should therefore bear a significant portion of their costs. The 1973 conference report stated that "the grant authority must be exercised if the high purposes of this legislation are to be met."

In response to this encouragement and support, thirty-nine States have entered into 49 Cooperative Agreements under section 6 of the Act. States are providing recovery efforts, research, surveys, law enforcement, land acquisition, and public information/education programs for 88 federally-listed and 173 State listed and candidate endangered or threatened species.

Failure to appropriate funds in fiscal year 1982 and proposals to appropriate no funds in fiscal year 1983 for section 6 programs has generated deep skepticism among State wildlife agencies which have been urged to develop programs only to see the funding source completely withdrawn. Adequate funding of section 6 programs is, in the Committee's view, a matter of extreme importance. The amount authorized in the current legislation and in this bill represents what would be an adequate level of funding for this important aspect of the endangered species program.

The expertise of the States in managing wildlife is well recognized and respected and it is clearly in the best interest of any Federal wildlife conservation program to draw on and benefit from the State's knowledge and experience. Thus, cooperation between State and Federal agencies, not only under section 6 of the Act, but throughout the Act's implementation, is of the utmost importance to the protection and recovery of endangered and threatened species. Emphasis should be given to informational exchanges with State wildlife agencies on Federal proposals for the listing, protection, or recovery of species.

Section 3(15) of the Act provides authority to the Secretary of Agriculture to enforce import and export restrictions for "terrestrial plants." This authority is consistent with the USDA's existing port inspection system for plants, which prevents accidental imports of diseases and pests.

The problem of defining "terrestrial" plant species has created confusion. For example, some have argued that bogdwelling orchids and carnivorous plants are aquatic plants. Although there has been no legal challenge of Agriculture's jurisdiction over these species, this cannot be ruled out. Removal of the qualifier "terrestrial" from Section 3(15) and from the authorization of appropriations in Section 15(3) would end this confusion.

## Other Points

There are several points concerning the Endangered Species Act which should be addressed. Although these matters do not warrant amendments to the law, some clarification would be useful.

### COMMERCIAL ACTIVITY

Section 3(2) of the Act defines "commercial activity" to mean all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling. The exhibitions of commodities by museums or similar cultural or historical organizations are specifically excluded by the statutory definition.

As in the Lacey Act Amendments of 1982 (P.L. 97–79), the phrase "commercial activity" does not encompass the lawful dealings of a hunter with his taxidermist. Similarly, the dealings of a hunter with his travel agent or an airlines to arrange a trip for the acquisition of wildlife does not constitute an activity of industry or trade for the purposes of this Act. However, a commercial arrangement whereby a professional guide offers his services to illegally obtain wildlife is,

in effect, an unlawful offer to sell wildlife. When such an offer is made, it is a commercial activity within the meaning of the Act. The Act's criminal culpability requirement assures that innocent violators of the Act will not be subject to criminal penalties.

### LICENSING REQUIREMENT

Section 9(d) of the Act provides that it is unlawful for any person to engage in business as an importer or exporter of fish or wildlife or plants without first having obtained permission from the Secretary. As part of the Administration's ongoing review of the many Federal regulations and requirements that are based upon numerous laws, the Department of the Interior should review the licensing requirements that have been promulgated pursuant to section 9(d) of this Act. The paperwork and regulatory burden imposed by any such requirements should be the minimum necessary to accomplish the purposes of the law and to ensure proper administration of the law.

### SEIZURE AND FOREITURE

Section 11 of the Act authorizes the seizure and forfeiture of any fish or wildlife or plant that has been imported in violation of the law. As noted in a Fish and Wildlife Service Law Enforcement Memorandum dated April 30, 1982, however, discretion must be applied to avoid unnecessarily harsh forfeiture actions in certain noncommercial importation violations. Seizure for the purpose of seeking forfeiture will not always be appropriate where the conduct providing the grounds for seizure and forfeiture involves a non-commercial importation violation which is also non-culpable, that is, where there is no indication of fraud, negligence, or intent to violate the law.

Game trophies in transit through the United States were specifically addressed in the above-referenced memorandum. It was properly noted that non-commercial shipments of endangered species in-transit through the United States should not be seized where such shipments were lawfully exported from the country of origin and country of re-export, may be lawfully imported into the country of destination, and the exporter (or owner) gave explicit instructions not to ship through the United States or did all that could have reasonably been done to prevent transshipment and the circumstances leading to the property's transshipment were beyond the exporter's (or owner's) control. This exception, however, does not authorize the importation for the purpose of processing wildlife products or mounting of trophies in the United States and subsequent exportation without proper permits.

### "IMPORT" FROM ALASKA OR HAWAII

As used in this Act, the term "import" does not include the transportation of fish or wildlife or plants directly between the contiguous United States and any other States. Therefore, no importation occurs when a hunter lawfully takes a grizzly bear in Alaska and personally transports the animal by automobile directly through Canada to

another State or ships it directly to another State. If, on the other hand, the animal is left with a taxidermist in Canada the subsequent shipment to a State is an importation. Also, a tourist who purchases a wildlife product in a foreign country and returns to the contiguous United States by way of another State, such as Hawaii, imports the product only upon arrival in Hawaii. The subsequent direct transportation to another State is not an importation.

## Hearings

The Subcommittee on Environmental Pollution conducted oversight hearings on December 8 and 10, 1981. The bill, S. 2309, was introduced on March 30, 1982. The Subcommittee conducted hearings on the bill on April 19 and 22, 1982.

## Rollcall Votes

Section 7(c) of rule XXVI of the Standing Rules of the Senate requires publication of any rollcall votes. There were two rollcall votes during the Committee's consideration of the bill.

On May 5, 1982, the Subcommittee approved S. 2309 with amendments by a unanimous rollcall vote. The vote was recorded as follows:

### AYES

| | | |
|---|---|---|
| Chafee | Mitchell | Symms |
| Gorton | Moynihan | |
| Hart | Simpson | |

The Committee ordered the bill reported by a unanimous rollcall vote on May 11, 1982. The vote was recorded as follows:

### AYES

| | | |
|---|---|---|
| Abdnor | Domenici | Randolph |
| Baker | Gorton | Simpson |
| Baucus | Hart | Stafford |
| Bentsen | Mitchell | Symms |
| Burdick | Moynihan | |
| Chafee | Murkowski | |

## Regulatory Impact

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact of the reported bill.

The reported bill does not add to or reduce the regulatory authority provided by existing law.

The bill has no impact on the personal privacy of individuals.

The bill has no impact on paperwork of Federal agencies.

There is no specific economic impact of the bill.

The bill has no impact on recordkeeping requirements.

## Cost of Legislation

Paragraph 11(a) of rule XXVI of the Standing Rules of the Senate requires cost estimates and comparisons of costs to be incurred in carrying out the bill to be published in reports. In accordance with section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared a report on the costs to be incurred by the Federal Government resulting from the enactment of this bill. Such cost estimates follow:

U.S. Congress,
Congressional Budget Office,
*Washington, D.C., May 17, 1982.*

Hon. Robert T. Stafford,
*Chairman, Committee on Environment and Public Works,*
*U.S. Senate, Washington, D.C.*

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 2309, the Endangered Species Act Amendment of 1982.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Stanley L. Greigg
(For Alice M. Rivlin, Director).

### Congressional Budget Office—Cost Estimate

May 17, 1982.

1. Bill number: S. 2309.
2. Bill title: Endangered Spices Act Amendments of 1982.
3. Bill status: As ordered reported by the Senate Committee on Environment and Public Works, May 11, 1982.
4. Bill purpose: The bill authorizes the appropriation of $38 million for the implementation of the Endangered Species Act of 1973, for each of the fiscal years 1983, 1984, and 1985. In each of these fiscal years, the bill allocates $33.6 million to the Department of the Interior, $3.5 million to the Department of Commerce, and $1.9 million to the Department of Agriculture. This bill also amends several substantive and procedural provisions in the Endangered Species Act.
5. Cost estimate:

| | *Millions* |
|---|---|
| **Authorization level:** | |
| **Fiscal year:** | |
| 1983 | $39.0 |
| 1984 | 39.0 |
| 1985 | 39.0 |
| 1986 | ----- |
| 1987 | ----- |
| **Estimated outlays:** | |
| **Fiscal year:** | |
| 1983 | 37.7 |
| 1984 | 39.0 |
| 1985 | 39.0 |
| 1986 | 1.3 |
| 1987 | ----- |

The costs of this bill fall within budget function 300.

6. Basis of estimate: This estimate assumes that the bill will be enacted in fiscal year 1982 and that the amounts authorized will be appropriated for each year. Annual outlays were estimated using the historical two-year spendout pattern for the departments' endangered species programs.

7. Estimate comparison: None.

8. Previous CBO estimate: On May 14, 1982, the Congressional Budget Office transmitted a cost estimate for H.R. 6133, a bill ordered reported by the House Committee on Merchant Marine and Fisheries, May 5, 1982. The House bill is similar but not identical to S. 2309. The authorization levels and outlay estimates reflect the differences.

9. Estimate prepared by: Kathy Gramp.

10. Estimate approved by:

C. G. NUCKOLS
(For James B. Blum,
Assistant Director for Budget Analysis).

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## DEPARTMENTAL REPORTS

Departmental reports were submitted on S. 2309 by the Departments of the Interior, Agriculture, and State. The reports follow:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
*Washington, D.C., May 13, 1982.*

Hon. ROBERT T. STAFFORD,
*Chairman, Committee on Environment and Public Works,*
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is to provide you with our views on S. 2309 as ordered reported, a bill to amend the Endangered Species Act of 1973. We sincerely appreciate the attention given by the Committee to recommendations presented by the Department at the April 19 hearing. While we do have several comments on the reported bill, we strongly endorse its overall approach. Our recommendations are set forth below. Where appropriate, we have also provided specific legislative language to implement these recommendations.

### EXPERIMENTAL POPULATIONS

Section 2 of S. 2309 makes a much needed change in the Act that will be important to the conservation of threatened and endangered species. Recovery of a species is key to ensuring its survival. There are some instances, however, where the Service has progressed as far as possible in recovery actions within current habitat boundaries. For example, certain existing populations are at carrying capacity in currently occupied habitat, or they exist only as captive species in a captive propagation program and need habitat for release. The captive bred population of the red wolf in the Tacoma, Washington zoo is a good example. One of the most effective measures that can be taken to ensure recovery of these species is reintroduction into their historical range. However, this is also one of the most difficult recovery tasks to implement. To have a successful reintroduction program, it is essen-

tial to have the cooperation of the State and, in some cases the private or Federal land manager. States, however, fear that strigent provisions in the present Act will alter or eliminate wildlife and land management options available in the introduction area and are reluctant to give their approval. States have also raised the concern that the Service may be required to declare critical habitat, resulting in the removal of State control and prevent ongoing uses. As an example, the State of Colorado has hesitated in approving the introduction of the endangered squawfish into the Colorado River for fear that fishermen who inadvertently hook one of these fish could be subject to prosecution under the Act for "taking." An even greater concern is that the State fishery management program will be disrupted and the State forced to place priority on protection of the introduced endangered fish.

Federal agencies have voiced similar concerns and are often reluctant to give approval for reintroduction for fear of delay, alterations, or postponements of ongoing or proposed actions through application of section 7. TVA, for instance, has expressed concern about efforts to reintroduce the red wolf into the Land between the Lakes area in Tennessee without assurance that flexibility will be provided for the management of the species.

Section 2 of S. 2309 would help to address this very difficult situation by creating a new category of "experimental population." By authorizing the Secretary to issue special regulations for these species, the bill would provide the flexibility to fashion an administrative remedy to the problems raised.

There are three aspects of this amendment, however, where clarification would be helpful. First, the "not wholly separate" language contained in section 2(a) is somewhat confusing. We assume that it intended to address those situations where an experimental population rejoins the original population due to expansion, migration, or other reasons. If this is the case, we believe that this can be accomplished by adopting the definition of "experimental population" contained in H.R. 6133.

What constitutes a "non-essential" experimental population under section 2(b) is also unclear. It may be assumed that in most cases experimental populations would not be essential, because the continued existence of the species as a whole would not be jeopardized by their loss. Some species, however, are at such critically low levels that any loss would be jeopardizing and so experimental populations of these species should be designated as "essential." The dusky seaside sparrow is an example. We believe that the language of H.R. 6133—"in decline and in imminent danger of extinction"—is preferable.

Another question which should be clarified is whether the section 4 listing process would be applicable to the designation of experimental populations. The Committee should be aware that it is the intention of the Fish and Wildlife Service to promulgate special regulations each time that an experimental population is established. We intend for these regulations to serve essentially as a cooperative agreement between the Service and the appropriate State and Federal agencies and private individuals for the management of the species.

FEDERAL MATCHING SHARE

Section 3 increases the Federal matching share for section 6 programs from 66⅔ percent to 75 percent for single State programs, and from 75 percent to 90 percent for multi-State programs. The Administration, as a general policy, opposes this type of grant-in-aid program. The Service is not requesting section 6 funds in fiscal year 1983. Thus, we oppose any amendment increasing the matching share.

LISTING

Section 4 consolidates and revises the current process for listing species and determining critical habitat. The Department supports the amendments adopted by the Committee, which clarify questions raised by S. 2309 as introduced. We would, however, like to offer some additional clarifications.

Section 4(a) of existing law requires the Secretary to determine critical habitat "to the maximum extent prudent" concurrent with listing. Section 4(5) of S. 2309 expands this criteria to "the maximum extent prudent and determinable." It is unclear as to the intended interpretation of the term "determinable." If critical habitat can not be determined at the time of listing, but one can reasonably anticipate that such a determination could be made in the future, does listing proceed? If listing does proceed, will determination of critical habitat at a later date by prohibited?

In addition, paragraph 4(5) changes from 60 to 90 days before the effective date of a regulation the time in which the Secretary must give notice of the proposal. The assumption is that this includes 60 days for public comment prior to publication of the final regulation and 30 days from the publication of the final rule to the effective date. Clarification in legislative hitsory concerning these two points would be helpful.

We would also like to inform you of our interpretation of two other paragraphs. New paragraphs 4(b)(5)(f) would require that listing determinations be made on the basis of biological criteria set forth in the Act. This is the current practice and we have no objection to this amendment, which we interpret as allowing us to continue to comply with E.O. 12291 and applicable statutes in evaluating alternatives. New section 4(b)(4) would delete the requirement under existing section 4(f)(2)(B)(i)(II) that the Service publish a map of any proposed critical habitat in a newspaper in general circulation in the affected area. Notwithstanding this change, the Service will continue to identify the affected area in as great detail as possible, either through a map or a written description.

EXEMPTION PROCESS

The bill simplifies the existing section 7 exemption process in two ways: it assigns to the Secretary of the Interior, or Commerce as appropriate, the responsibility for making threshold decisions and preparing the report to the Endangered Species Committee (Committee). It also decreases the amount of time involved in the process. Both of

these changes are improvements over existing law. There are, however, several issues which should be addressed.

Section 5(b)(7)(A) reduces the time available to conduct the study and issue the report from 180 days to 150 days. This may strain the ability of the Secretary to prepare the report, without expediting the exemption process significantly. Unless considerable information about the proposed project is already available, even 180 days is a rather limited period within which to conduct the study necessary to address the exemption criteria. This could be the first time that the economics of the project and possible alternatives will be analyzed. This analysis is likely to be complex, so sufficient time should be provided for the Secretary to gather and analyze the relevant information.

The current exemption process takes 360 days to complete from the time an application is submitted. The process proposed in the amendment would take only 200 days: 20 days for the threshold decisions, 150 days for the report, and 30 days for the Committee decision. While we recognize that S. 2309 provides some flexibility for extension of these time limits, the Department recommends alternative time limits that would take a total of only 210 days, while imposing a slightly less restrictive deadline on preparation of the report. This would be 20 days for the threshold decisions, 180 days for the report and 10 days for the Committee decision. We believe that ten days should be sufficient time for the Committee to make its decision. From the time the threshold decisions are made, the Committee has 180 days notice that it will have to begin contemplating an exemption. Thus, ample time is provided to schedule a decision meeting. Further, since the staffs of the various Committee members will be briefed regularly on the progress of the report, the members should be well informed on the issues prior to the decision meeting. Thus, despite the limited timeframe, the integrity of the process could be maintained and a considered decision rendered within the statutory deadlines.

Section 5(b)(5), together with sections 5(b)(7) and 5(c)(3), also raises concerns. Section 5(b)(5) calls for the Secretary to determine whether an irreversible or irretrievable commitment of resources was made by the exemption applicant "to the extent determinable within the timeframe provided." Section 5(b)(7) requires the Secertary to discuss this issue in his report to the Committee. Section 5(c)(3) makes the Secretary's determination reviewable by the Committee and prevents the Committee from granting an exemption if it finds that the exemption applicant made an irreversible or irretrievable commitment of resources. Given the importance of the matter, it seems desirable to have the Committee make the determination. However, postponing this decision until the end of the exemption process creates unnecessary uncertainty and risks fasting both public and private resources. The Department recommends that the decision be retained as a threshold decision, made by the Secretary at the beginning of the exemption process, but that the decision be reviewable by the rest of the Committee within 30 days after the Secretary makes the decision. Some or all of these 30 days could overlap with the early stages of preparing the report to the Committee; however, a decision by the Committee to overturn a decision by the Secretary would waste far fewer resources

than if decision was made later. Rulemaking by the Committee would spell out the process in detail.

This section of the bill deletes entirely the irresolvable conflict threshold determination. Although in most instances this determination will be a perfunctory, procedural matter, we believe that it is important to retain it as a threshold determination. The Committee is designed to function as an administrative court of last resort. Circumstances can change, procedures be overlooked, and options remain unexplored. In such situations the Secretary should have the flexibility to reject an application until all other administrative avenues have been exhausted. We therefore recommend that the irresolvable conflict determination be retained.

This section of the bill contains four references to the preparation of the report "in consultation with the members of the Committee." The world "consultation" is a term of art in the Endangered Species Act. We believe that the other members of the Committee should be kept regularly informed of the progress on the report and be given the opportunity to participate in the collection of information, the analysis, and the drafting of the report. However, we believe a more appropriate term would be "in coordination" with the rest of the Committee, with the understanding that much or all of this coordination would take place at the staff level.

Section 5(a) of the bill strikes from section 7(e)(10) of existing law the sentence requiring that a Committee member's representative be a Presidential appointee. For clarification purposes, only the portion requiring the representative to be someone who has been confirmed by the Senate should be deleted. The representative, however, should be a Federal officeholder.

It is our understanding that while section 5(b)(2)(C) amends the responsibility for the report in situations where there might be a conflict of interest, it leaves the responsibility for making the threshold decisions unchanged, and that these decisions are to be made by the Secretary who issues the biological opinion and receives the exemption application. We recommend that this be clarified in the legislative history.

While section 5(b)(2)(C) of S. 2309 refers to the Secretary of Commerce, it is the Administrator of NOAA, not the Secretary, who is a member of the Committee. Therefore, the question has been raised as to whether the bill's sponsors intended the Secretary or the Administrator to prepare the report. A clarification would be helpful.

### CONSULTATION

Section 6 of S. 2309 amends section 7(b) of the Act to require consent of license or permit applicants on extensions of consultation of greater than 60 days. As a matter of policy, we attempt to keep such applicants fully informed about the reasons for all extensions of consultation. The great majority of all our consultations are completed within the 150 days allowed before applicant consent is required under this amendment. However, it is occasionally necessary to extend this period in order to obtain adequate data on which to base a decision.

EXCEPTION ON TAKING

Under current law, an action which has been granted an exemption is not considered to be a taking under section 4(d) or 9(a). While there is no explicit exception for actions which have received a favorable biological opinion, our Solicitor's office has concluded that section 7 contains an implied exemption from section 9 for incidental takings within the scope and nature of a project where non-jeopardy opinion has been issued under section 7. Nevertheless, a question still remains as to whether an agency or individual who has received a non-jeopardy opinion may be subject to prosecution or civil injunctive litigation for the taking of a species.

We agree with the amendment adopted by the Committee to address this anomaly in the law. Under the amendment, the biological opinion would contain a determination of the extent of incidental take of a species that would not jeopardize its cotninued existence. In conjunction with this determination, the Secretary would also provide "reasonable and prudent measures" that must be taken to minimize takings of species. Actions in compliance with such measures would not be considered a taking of the species involved under sections 4(d), 9(a)(1)(B), or 9(a)(1)(C) of the Act. We believe it would be helpful to have legislative history indicating that the use of the term "extent of take" in the amendment would not mean that the opinion would always designate a specific number of individuals that could be taken. Such a number would be specified where practicable, but would not be available in the case of every species or action. We also support the new amendment to section 10 that would permit the Secretary to issue a permit for incidental taking pursuant to an approved conservation plan. We believe that this provision could result in opportunities not otherwise available to allow projects with identified effects to continue and to enhance the condition of species.

AUTHORIZATIONS

In lieu of the authorizations provided by section 11 for the Department of the Interior, the Department recommends a one-year authorization of $16,550,000, the amount contained in the President's fiscal year 1983 budget request.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

J. CRAIG POTTER,
*Acting Assistant Secretary.*

Enclosure.

DEPARTMENT OF THE INTERIOR'S PROPOSED AMENDMENTS TO S. 2309

1. On page 1, strike out line 5 and all that follows through page 3, line 19, and substitute from H.R. 6133 as reported by the Committee on Merchant Marine and Fisheries the appropriate language pertaining to experimental populations.

2. On page 3, strike out line 20 and all that follows through page 4, line 3.

3. On page 12, line 17, strike out "first sentence thereof" and insert in lieu thereof "words 'the appointment to which' and all that follows in the first sentence and inserting in lieu thereof a period.".

On page 13, lines 9 and 17, and in the proviso added by the Committee beginning on line 18, and on page 15, line 25, strike out "consultation" and insert in lieu thereof "coordination".

On page 14, immediately following line 24, insert the following: "(A) determine whether an irresolvable conflict exists;

On page 15, line 1, strike out "(A)" and insert in lieu thereof "(B)".

On page 15, immediately following line 12, substitute the following for the Committee amendment:

> (C) determine whether the Federal agency concerned and the exemption applicant have refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

On page 15, line 13, strike out "(B)" and insert in lieu thereof "(D)".

On page 15, line 16, as amended by the Committee, strike out "subclauses (i), (ii) and (iii)" and insert in lieu thereof "subparagraphs (A), (B), and (C)".

On page 15, line 17, insert immediately after "paragraph" the following:

> ; except that in the determination under subparagraph (C), the Secretary's decision is reviewable by the full Committee within 30 days after the decision.".

On page 15, lines 24 and 25, as amended by the Committee, strike out "subclauses (i), (ii) and (iii)" and insert in lieu thereof "subparagraphs (A), (B), and (C)".

On page 16, strike out lines 13 through 20, and on line 22, strike out "(D)" and insert in lieu thereof "(B)".

On page 17, line 10, insert immediately after "board" the following "; and".

On page 17, line 11, insert a period immediately before the semicolon and strike out "and".

On page 17, immediately following line 11, insert the following: "(E) striking out subparagraph (C); and

On page 17, line 12, strike out "(E)" and insert in lieu thereof "(F)".

On page 18, line 24, strike out "; and" and insert in lieu thereof a period.

On page 19, strike out lines 1 through 12, including the language added by the Committee amendment.

4. On page 22, line 7, strike out "sections 6 and 7" and insert in lieu thereof "section 7".

On page 22, lines 9 and 10, strike out "$27,000,000 for each of fiscal years 1983, 1984, and 1985" and insert in lieu thereof "$16,550,000 for fiscal year 1983".

On page 22, strike out lines 23 through 25 and all that follows through line 3 on page 23.

On page 22, line 4, strike out "(c)" and insert in lieu thereof "(b)".

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
*Washington, D.C., May 10, 1982.*

Hon. JOHN H. CHAFEE,
*Chairman, Subcommittee on Environmental Pollution, Committee on Environment and Public Works, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in regard to the reauthorization of appropriations for the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). While the Department supports the reauthorization of appropriations for the Act, we offer the following suggestion for an amendment.

The provisions of the Endangered Species Act and the Convention on International Trade in Endangered Species of Wild Fauna and Flora impose certain restrictions on the international movement of specified plants. Under the Act, the United States Department of Agriculture (USDA) is responsible for enforcement of the provisions of the Act and the Convention which pertain to the importation and exportation of terrestrial plants. This responsibility has, in turn, been delegated to the Department's Animal and Plant Health Inspection Service (APHIS).

Section 9(f)(1) of the Act (16 U.S.C. 1538(f)(1)) requires plants to be imported or exported only at ports designated by the Secretary of the Interior or at nondesignated ports upon approval by the Secretary of the Interior in accordance with specified criteria. Since APHIS is responsible for enforcement of the provisions of the Act which pertain to the importation and exportation of terrestrial plants, determinations concerning ports for the importation and exportation of terrestrial plants should be based on the availability of APHIS personnel and facilities for conducting the necessary enforcement activities. These determinations relate solely to information within USDA. Therefore, we recommend that the Act be amended to authorize the Secretary of Agriculture to designate the ports for the importation and exportation of terrestrial plants and to make determinations concerning the importation or exportation of terrestrial plants at nondesignated ports.

We enclose a suggested amendment to Section 9(f)(1) of the Act.

An identical letter has been sent to Honorable John B. Breaux, Chairman, Subcommittee on Fisheries.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

JOHN R. BLOCK,
*Secretary.*

Enclosure.

Section 9(f)(1) of the Endangered Species Act of 1973 (16 U.S.C. 1538(f)(1) is amended to read:

> (f)(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to

section 4 of this Act as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or marine plants, except at a port or ports designated by the Secretary of the Interior, or to import into or export from the United States terrestrial plants, except at a port or ports designated by the Secretary of Agriculture. For the purpose of facilitating enforcement of this Act and reducing the costs thereof, the Secretary of the Interior, with regard to fish and wildlife and marine plants, or the Secretary of Agriculture, with regard to terrestrial plants, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, with regard to fish, wildlife, and marine plants, and the Secretary of Agriculture, with regard to terrestrial plants, under such terms and conditions as they may prescribe, may permit the importation or exportation at non-designated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons if, in their discretion, they deem it appropriate and consistent with the purpose of this subsection.

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DEPARTMENT OF STATE,
*Washington, D.C., May 10, 1982.*

HON. ROBERT T. STAFFORD,
*Chairman, Committee on Environment and Public Works,*
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is to provide you with our views on S. 2309 as ordered reported by the Subcommittee on Environmental Pollution, a bill to amend the Endangered Species Act of 1973.

The Department strongly supports the Endangered Species Act of 1973 and considers that, in general, the amendments proposed in S. 2309 would improve its implementation. Many of the proposals concerning matters under the exclusive jurisdiction of the Departments of Interior and Commerce, and this Department is not in a position to comment on them. We do, however, have comments on three items which relate to relations with foreign nations and United States treaty obligations.

Under Section 4, in the "Listing Process" "Basis for Determinations", the bill would delete the requirement *for cooperation with the Secretary of State* in taking into account efforts made by foreign nations to protect species during the process of determining whether species are endangered or threatened. The Department considers that: (1) as relation with foreign nations fall within the province of the Department of State, and (2) as the Department is in a position through its diplomatic and consular missions abroad to expedite information collection of foreign efforts to protect species, the provision for cooperation with the Department of State should be retained in Section 4(b)(1).

The Department strongly supports the proposed addition to Section 4 of provision (b)(5)(B) which: (1) provides for notification, in so far as practical, in cooperation with the Department of State of regulations relating to listing of species to foreign nations: (a) in which species are believed to occur or (b) whose citizens harvest the species on the high seas, and (2) would invite comments from foreign nations. If this proposed provision is enacted, the Department will make every effort to cooperate in implementing it.

The Department understands the rationale for the proposal to amend Section 8A(c) on the functions of the United States Scientific Authority in implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). We consider proposed paragraph 8A(c)(2) to be a substantial improvement on earlier proposals which have been offered to amend the Act, particularly in the light of recent court decisions relating to export of bobcat, as the proposed paragraph would retain the authority of the Secretary of the Interior to make "no detriment" determinations and not *require* that he *use or not use* any specific method in arriving at such determinations.

There are three technical points we would make, however, concerning the proposed amendment at Section 8(2) of S. 2309. First, the words "from the sea" should be added after "introduction" in the first and third sentences to be consistent with the wording of the Convention. Second, the proposal makes reference only to Article IV and Appendix II of the Convention. We question whether Article III and Appendix I of CITES should not also be included in this reference. Although trade in Appendix I species is regulated differently than that of Appendix II species (no commercial trade in the former), the Secretary of Interior, acting as our scientific authority, must make a finding of no detriment to survival of the species for exports and introduction from the sea of specimens on either appendix. The Secretary should be able to base such a determination on the appropriate criteria in either case. To include only Appendix II species in this section creates an implication that the standard is different for Appendix I species. Third, the Department suggests that in the last two sentences of this section, the phrase "professionally accepted" be used in place of the word "reliable" relating to "wildlife management practices." This would make clear that the practices which the United States considers as an appropriate basis for no detriment findings are generally accepted by the wildlife management profession.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

POWELL A. MOORE,
*Assistant Secretary for Congressional Relations.*

## CHANGES IN EXISTING LAW

In the opinion of the Committee, it is necessary to dispense with the requirements of subsection (f) of rule XXIX of the Standing Rules of the Senate in order to expedite the business of the Senate.

○

Calendar No. 601

97TH CONGRESS
2d Session

SENATE

REPORT
No. 97-419

# COASTAL BARRIER RESOURCES ACT

MAY 26 (legislative day, MAY 25), 1982.—Ordered to be printed

Mr. CHAFEE, from the Committee on Environment and Public Works, submitted the following

## REPORT

together with

## ADDITIONAL VIEWS

[To accompany S. 1018]

The Committee on Environment and Public Works, to which was referred the bill (S. 1018) to protect and conserve fish and wildlife resources, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

### GENERAL STATEMENT

There are presently about 1.4 million acres of coastal barriers (which include islands, spits, tombolos, and bay mouth barriers) with about 2,500 miles of shoreline along the Atlantic and Gulf Coasts of the United States. This acreage consists of 751,713 acres of fastlands and 682,044 acres of wetlands. About 40 percent of this area is developed or in the process of being developed; about 47 percent is undeveloped and protected; and the remaining portion, about 13 percent, is presently undeveloped and unprotected. S. 1018 would affect the undeveloped and unprotected areas only.

Coastal barriers are among the most unstable of landforms. Beaches, dunes, and entire islands erode and migrate as ocean currents, wind, and waves undermine and move them. Storms can wipe out whole sections of beach when they are overwashed and can just as easily close inlets as sediments are redeposited. The sands of the beaches continually move and are redistributed. In response to a rising sea level (about one foot per century along the Atlantic coast), these islands are generally migrating landward. The combination of erosion and migration, as well as the effects of flooding from hurricanes and other storms, make these areas exceptionally hazardous places for permanent man-made structures and human habitation.

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S323-3

Barriers which are now considered by many to be safe for building can become extremely hazardous or even disappear within a few years. For example, the U.S. Army Corps of Engineers predicts that within 50 years, if shoreline erosion continues at its present rate, about 40 percent of the homes that are presently on Folly Island, South Carolina, will be in the sea. Construction is also taking place where inlets were recently closed by natural forces. Since these inlets may reopen at any time, such development is highly hazardous.

Coastal barriers are so named because they create a "barrier" that buffers the mainland and associated wildlife-rich aquatic systems—such as lagoons, marshes, and estuaries—from the direct attack of ocean waves, storms, and hurricanes.

Coastal barriers create and maintain wetlands and estuaries which nurture vital fish stocks. It has been estimated by the National Marine Fisheries Service (NMFS) that more than 80 percent of the shellfish and finfish caught by sport fishermen on the Atlantic and Gulf Coasts are dependent upon these estuaries during some stage of their life cycles. Moreover, NMFS estimates that over 90 percent of the U.S. commercial catch in the Gulf of Mexico and more than 80 percent of the commercial harvest on the Atlantic coast is comprised of species dependent on coastal barrier habitats. In 1980, these percentages of the commercial harvest translated into a dockside value in excess of one billion dollars.

Federal, State, local governments, and private organizations have recognized the importance of these areas for their high fish and wildlife values. The U.S. Fish and Wildlife Service has established over 35 refuges on coastal barriers and their associated waters and marshes because they provide key habitats for a wide variety of wildlife, especially waterfowl and other migratory birds. The Department of the Interior (DOI) estimates that over 40 percent of the Atlantic flyway black duck population depends on marshes created by coastal barriers and more than 50 percent of the Central Flyway waterfowl population depends on the Texas coastal region. For instance, 80 to 90 percent of the world population of redhead ducks winter in the Laguna Madre which is created and maintained by Padre Island, a coastal barrier.

More than 20 endangered or threatened species find habitat on coastal barriers. These include raptors such as the bald eagle and peregrine falcon, as well as the whooping crane, Eastern brown pelican, and sea turtles.

Despite the rich wildlife values of these areas, their highly unstable nature, and their vulnerability to storms and hurricanes, coastal barriers are being developed at an estimated rate of 5,000 to 6,000 acres per year.

This legislation, S. 1018, recognizes that coastal barriers should be conserved in their natural state for two reasons. First, as stated above, these areas provide essential habitat for fish and wildlife. Secondly, it is evident that Federal tax dollars encourage development of presently undeveloped areas and then perpetuate that development by providing extensive disaster relief and rebuilding assistance in the aftermath of hurricanes and other storms. DOI has estimated that over the past six years the Federal Government has spent about $800 million to aid development and redevelopment on barrier islands in the form of direct and indirect expenditures. Further, DOI estimates that over the next 20 years the Federal Government would spend between $5.5

billion and $11 billion to aid development of presently undeveloped coastal barriers.

Federal expenditures which subsidize and thereby encourage development in these dynamic areas constitute an unwise investment. Storms and other natural processes inevitably undermine the attempt to stabilize and develop these areas. Federal investments are lost and, under current practice, replaced with new Federal investment in a continuing cycle of wasted Federal funds.

By aiding development of coastal barriers, the Federal Government is diminishing the productivity of estuaries and wetlands in terms of fish and wildlife resources; increasing risks to life and property; and, reducing the capacity of such areas to protect the mainland from storms. Also, barrier islands are extremely valuable as recreation areas. Their development reduces public access to beaches and the availability of natural areas and open space near urban centers along the Atlantic and Gulf coasts.

SECTION-BY-SECTION ANALYSIS

*Section 1.—Short Title*

This Act may be cited as the "Coastal Barrier Resources Act."

*Section 2.—Findings and Purpose*

Section 2 states that coastal barriers along the Atlantic and Gulf Coasts are essential spawning, nesting, and feeding areas for migratory birds, aquatic organisms, and other wildlife. The section further states that these habitats are being damaged and lost to development and that certain actions and programs of the Federal Government have encouraged and subsidized such development. Thus, a coordinated program among Federal, State, and local governments is critical to the more appropriate use and conservation of coastal barriers.

This section also declares that it is the purpose of the Act to minimize damage to fish, wildlife, and other natural resources associated with coastal barriers along the Atlantic and Gulf coasts by restricting Federal expenditures and financial assistance which have the effect of encouraging development of coastal barriers and by establishing a Coastal Barrier Resources System.

*Section 3.—Definitions*

Section 3 defines the term "coastal barrier" as a depositional geologic feature which consists of unconsolidated sedimentary materials subject to wave, tidal, and wind energies and which protects landward aquatic habitats from direct wave attack. Associated aquatic habitats, including adjacent wetlands, marshes, estuaries, inlets, and near shore waters are also included in the definition of a coastal barrier. This definition is included for information purposes only. The maps referenced in section 4 of the bill designate which areas meet this definition for the purposes of the Act.

This section also defines the term "financial assistance" as any form of Federal assistance *other than* deposit or account insurance for customers of banks, savings and loan associations, credit unions or similar institutions; the purchase of mortgages or loans by the Government National Mortgage Association, the Federal National Mortgage Association, or the Federal Home Loan Mortgage Corporation; and assistance for environmental studies, planning and assessments that are required by such laws as the National Environmental Policy Act or for the processing or other requirements incident to the issuance of permits such as those required under section 404 of the Clean Water Act or section 10 of the Rivers and Harbors Act of 1899. The legislation would not restrict Federal funds on undeveloped barriers for programs entirely unrelated to development such as the Social Security program, the Food Stamp program, Medicaid and Medicare programs or other social programs.

*Section 4.—The Coastal Barrier Resources System*

Section 4 establishes the Coastal Barrier Resources System which is referred by a set of maps dated April 28, 1982. The addition of new units to the System or the deletion of existing units within the System as approved by the Congress can only be authorized by a Act of Congress. Minor changes to System units, however, are permitted under section 4(c).

The areas delineated in the maps were treated as undeveloped only if there were few, if any, man-made structures on the barrier and these structures and man's activities on the barrier, did not significantly impede geomorphic and ecological processes. A threshold of approximately one structure per five acres of fastland was used in determining if a coastal barrier was developed. This threhold has been used in previous delineations of undeveloped coastal barriers prepared by DOI. Areas with structures that exceed this threshold tend to interfere with natural processes of coastal barriers and, therefore, generally would not fall within the definition of an undeveloped coastal barrier. It is important to note that, for the most part, coastal barriers are either much more or much less developed than this threshold level.

Section 4 also states that areas established under Federal, State, or local law or hold by a qualified organization (as defined in paragraph (3) of section 170(h) of the Internal Revenue Code of 1954), primarly for wildlife refuge, sanctuary, natural resource conservation purposes were not included within the Coastal Barrier Resources System. For the purposes of the Act, a qualified organization (as defined in paragraph (3) of section 170(h) of the Internal Revenue Code of 1954) must have had the intent as well as the capability to maintain the natural character of a coastal barrier ecosystem. The organization must have also had a real property interest in the coastal barrier unit to provide for its protection and maintenance.

Upon enactment of S. 1018, section 4 requires that maps of the System be available in appropriate Federal offices and distributed to Governors of affected State and local governments where System units are located.

To ensure the accuracy of the maps, section 4(c) allows the Secretary to make minor and technical modifications to the boundaries of the system units within 180 days from the date of enactment. These changes, however, must be consistent with the purposes of the Act. Minor modifications are not intended to result in major deletions or additions of system units or portions thereof. They should simply reflect minor changes, in some cases perhaps only a few feet. For example, if a boundary line runs down the middle of an existing road, the line should be changed to clarify whether the road is or is not within the System unit.

The Secretary is also required to update the boundaries of the System units, at least once every five years, solely to reflect changes that have occurred in the size or location of any System units as a result of natural forces.

*Section 5.—Limitations on Federal Expenditures Affecting the System*

Section 5 states that within the Coastal Barrier Resource System, as delineated on the maps, new Federal expenditures and financial

assistance are prohibited for any purpose including, for example, the construction of roads and bridges, sewers, or federally guaranteed loans, such as VA or FHA loans for home construction. Federal assistance for stabilization projects is also prohibited except in cases where an emergency threatens life, land and property immediately adjacent to a system unit.

It is important to note that section 5 does not prohibit banks, savings and loans or other commercial financial institutions (including those insured by the Federal Government) from making loans for homes or other forms of construction within the System units. This legislation does not prohibit private financial transactions or the construction of structures or facilities that are funded with private funds or funds provided by state and local governments.

Under Section 5, an expenditure or financial assistance made available under authority of Federal law shall be a new expenditure if no money for construction or purchase purposes was appropriated or no legally binding commitment for the expenditure for financial assistance was made before enactment of S. 1018. The former instance concerns cases where funds must be appropriated by Congress; the latter concerns cases, such as a loan to an individual, where a contract has been entered into between the Federal Government and a private entity.

Although Section 5 prohibits the expenditure of Federal funds on undeveloped coastal barriers, certain exceptions to the prohibition are outlined in section 6 of the bill.

*Section 6.—Exceptions*

Section 6 allows specific exceptions from the general prohibition on new Federal expenditures and assistance.

Recognizing the national need to reduce our dependence on foreign energy sources, funds are permitted for the exploration and extraction of energy resources which can only be carried out within the System.

Federal expenditures, for the maintenance of existing channel improvements and related structures, such as jetties, including the disposal of dredge materials related to such improvements, are excluded from the general prohibition. The disposal of dredge materials shall not be limited to existing disposal sites that are in use upon the date of enactment of S. 1018. The use of future disposal sites for dredge materials is not precluded by this legislation so long as they are necessary for the maintenance of an existing project.

Funds for military activities essential to national security are also permitted.

Funds for other specific projects are also permitted provided they are carried out in a manner consistent with the purposes of the Act. They are:

1. Establishment, operation, and maintenance of air and water navigation aids and devices.
2. Projects under the Land and Water Conservation Fund.
3. Projects which provide for the study, management, protection and enhancement of fish and wildlife resources and habitats. Such projects may include acquisition of habitat or struc-

tural stabilization to protect these habitats, and recreational projects.

4. Scientific research.

5. Assistance for emergency actions essential to saving lives or protection of property within the System units. Such actions shall be limited to the extent necessary to alleviate the emergency and not be used as a justification for any projects that exceed the scope and needs of the true and immediate emergency.

6. Funds for the maintenance, replacement, reconstruction, or repair, but not the expansion, of publicly owned or publicly operated roads, structures, or facilities would also be permitted.

7. Nonstructural projects such as the planting of dune grass or beach nourishment which mimic, enhance, or restore natural stabilization systems would be permitted for shoreline stabilization.

The Secretary of the Interior must be notified by the appropriate Federal officer prior to the expenditure of Federal funds for purposes that are within the scope of section 6.

*Section 7.—Certification of Compliance*

This section requires that the Director of the Office of Management and Budget make, on an annual basis, a written certification that each agency has complied with the provisions of S. 1018. The certification shall be submitted to the House of Representatives and the Senate pursuant to the schedule set forth in the Congressional Impoundment Control Act of 1974.

*Section 8.—Priority of Laws*

Setcion 8 assures that S. 1018 will not disturb the current, delicate balance between other Federal laws operating with regard to coastal barrier areas and State and local laws. S. 1018 is not intended to preempt State or local laws unless there is a direct and positive conflict. Thus, State and local governments would be free to take additional measures, consistent with Federal laws, to control their coastal resources.

Additionally, section 8 clarifies that S. 1018 is not intended to interfere with a State's right to protect, rehabilitate, preserve and restore lands within its established boundary, provided Federal resources are not used in doing so.

*Section 9.—Separability*

This section is a standard separability provision. It provides that each provision and application of this law will be judged on it own merits.

*Section 10.—Report to Congress*

Section 10 requires the Secretary to prepare a report with recommendations for the conservation of the fish, wildlife, and other natural resources of the System. The report shall evaluate and compare management alternatives including acquisition of units for administration under the National Wildlife Refuge System. The Secretary shall also report on recommendations for additions to or deletions from the System as well as modifications to the boundaries of the various System units.

The report shall be submitted within three years after enactment of S. 1018. In preparing the report, the Secretary is required to consult with the Governors of the affected States and to provide the opportunity for and consideration of public comment. The report shall contain a summary of the comments received from the Governors of the States, other government officials, and the public.

*Section 11.—Authorization of Appropriations*

Section 11 authorizes an appropriation of $1,000,000 for the period beginning October 1, 1982 and ending September 30, 1985 for the purposes of carrying out section 10.

## FLOOD INSURANCE

Section 5 of S. 1018, as introduced, would have prohibited the sale of Federal flood insurance policies with respect to new structures or substantial improvements of existing structures on undeveloped barriers upon date of enactment. During markup, the Committee adopted an amendment to S. 1018 to delete from section 5 the prohibition of Federal flood insurance. This amendment was intended to ensure that S. 1018 conformed with section 1321 of the National Flood Insurance Act of 1968, as added by section 341 of the Omnibus Budget Reconciliation Act of 1981, P.L. 97–35.

The Omnibus Budget and Reconciliation Act provides that no new Federal flood insurance coverage shall be provided on or after October 1, 1983, for any new construction or substantial improvements of structures located on undeveloped coastal barriers as designated by the Secretary of Interior.

## HEARINGS

The Subcommittee on Environmental Pollution held three days of hearings on S. 1018. One field hearing was held in Providence, Rhode Island, on August 13, 1981. Hearings were held in Washington, D.C., on October 21, 1981, and February 3, 1982.

## ROLLCALL VOTES

Section 7(c) of rule XXVI of the Standing Rules of the Senate requires publication of any rollcall votes. There was one rollcall vote during the committee's consideration of the bill. The committee ordered the bill reported on May 13, 1982, by a rollcall vote of 13 to 0 with one member voting "present."

## EVALUATION OF REGULATORY IMPACTS

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee makes the following evaluation of regulatory impact of the reported bill.

The reported bill does not add to or reduce the regulatory authority provided by existing law.

The bill has no impact on the personal privacy of individuals.

The bill has minimal impact on paper work to the extent that Federal agencies must notify the Secretary of the Interior about permitted expenditures of new Federal funds and expenditures on undeveloped coastal barriers. The Director of the Office of Management and Budget shall, on behalf of each Federal agency, make a written certification that each agency has complied with the provisions of the Act. Finally, the Secretary is required to provide copies of the maps to the affected States and political subdivisions.

In testimony before the Subcommittee on Environmental Pollution, Secretary of the Interior James Watt stated that the present value of Federal expenditures on undeveloped coastal barriers over the next 20 years could cost the American taxpayer from $5.5 billion to $11 billion for initial construction—depending upon the degree of development. If S. 1018 is enacted, this estimate translates into a cost savings to the Federal Treasury of at least $250 million per year.

Other than the requirements previously mentioned, the bill has no impact on recordkeeping requirements.

COST OF LEGISLATION

Paragraph 11(a) of rule XXVI of the Standing Rules of the Senate requires cost estimates and comparisons of costs to be incurred in carrying out the bill to be published in reports. In accordance with section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared a report on the costs to be incurred by the Federal Government resulting from the enactment of this bill. Such cost estimates follow:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, D.C., May 17, 1982.*

Hon. ROBERT T. STAFFORD,
*Chairman, Committee on Environment and Public Works,*
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 1018, the Coastal Barrier Resources Act.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

STANLEY L. GREIGG
(For Alice M. Rivlin, Director).

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

MAY 14, 1982.

1. Bill number: S. 1018.
2. Bill title: Coastal Barrier Resources Act.
3. Bill status: As ordered reported by the Senate Committee on Environment and Public Works, May 13, 1982.
4. Bill purpose: The purpose of this legislation is to minimize damage to natural resources associated with coastal barriers. The bill establishes a Coastal Barrier Resources System, which is to consist of undeveloped coastal barriers on the Atlantic and Gulf coasts of the United States, and restricts federal expenditures for projects encouraging the development of coastal barriers. The Secretary of the Interior is instructed to prepare a report, within three years of the bill's enactment, with recommendations for the long-term conservation of coastal natural resources. The appropriation to the Secretary of the Interior of $1 million is authorized for fiscal years 1983 through 1985 for the preparation of that report.

5. Cost estimate:

| | Millions |
|---|---|
| Authorization level: | |
| Fiscal year: | |
| 1983 | $1.0 |
| 1984 | ----- |
| 1985 | ----- |
| 1986 | ----- |
| 1987 | ----- |
| Estimated outlays: | |
| Fiscal year: | |
| 1983 | .3 |
| 1984 | .4 |
| 1985 | .3 |
| 1986 | ----- |
| 1987 | ----- |

The costs of this bill fall within budget function 300.

6. Basis of estimate: The authorization level is that stated in the bill and is assumed to be appropriated prior to the start of fiscal year 1983. Outlays were estimated on historical patterns for similar activities.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Anne E. Hoffman.

10. Estimate approved by:

C. G. NUCKOLS,
(For James L. Blum,
Assistant Director for Budget Analysis).

## CHANGES IN EXISTING LAW

In compliance with the requirements of Section 12 of rule XXVI of the Standing Rules of Senate, there are no changes in existing law made by the bill, as reported.

## ADDITIONAL VIEWS OF MR. BENTSEN

There are several issues in this bill that I would like to raise as both a matter of policy and principle. However, I am not going to be able to address these issues on this bill. Because there are members of my family who hold an option on some of the land that would be affected by this bill, there are people who would argue that any activity on my part would not be based on questions of policy, would not be based on principle. Rather, they would argue that my actions would be based on some personal benefit that I might gain. This would not be true. However, in order to assure that no questions can be raised about my motivation on this issue, I voted "Present" on this bill in Committee and will not participate in consideration of the bill by the full Senate.

LLOYD BENTSEN.



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